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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Petitioners,

v.

Timothy D. POPE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Alice Ann Byrne
ALABAMA DEPT. OF PERSONNEL
64 North Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Matthew H. Lembke
John C. Neiman, Jr.
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Christopher W. Weller
CAPELL & HOWARD, P.C.
150 South Perry Street
Montgomery, AL 36102

Attorneys for Petitioners

September 15, 2008

QUESTION PRESENTED

"Numerous federal statutes allow courts to award attorney's fees to the 'prevailing party.'" *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). The question presented here, which has divided the lower courts, is:

> Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes?

The Eighth and Eleventh Circuits have answered yes to this question; the Second, Seventh, and D.C. Circuits have all answered no.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The Petitioners in this Court, defendants-appellants below, are as follows: The State of Alabama and its agencies, boards, commissions, and officials, including the Alcohol Beverage Control Board; the Board of Public Accountancy; the Bureau of Tourism and Travel; the Commission on Aging; the Commission on Physical Fitness; the Department of Agriculture and Industries; the Department of Conservation and Natural Resources; the Department of Corrections; the Department of Economic and Community Affairs; the Department of Education; the Department of Finance; the Department of Human Resources; the Department of Industrial Relations; the Department of Labor; the Department of Mental Health and Mental Retardation; the Department of Public Health; the Department of Rehabilitation Services; the Department of Revenue; the Department of Voter Registration; the Development Office; the Emergency Management Agency; the Industrial Development Training Agency; the Labor Board; the Medicaid Agency; the Retirement Systems of Alabama; the Securities Commission; the State Board of Registrars; the State Docks; the State Personnel Board; the State Personnel Department; Lauderdale County; the Lauderdale County Commission; the Florence/Lauderdale County Emergency Management Agency; and Thomas G. Flowers.

The Respondent in this Court, intervenor/plaintiff-appellee below, is Timothy D. Pope.

Additional parties who participated in the underlying litigation in the district court but did not participate ei-

ther in the ensuing attorney's-fees litigation in the district court or in the court of appeals are as follows:

The United States of America, as the original plaintiff in the underlying litigation, sought and obtained injunctive relief against the State defendants but, as relevant here, jointly moved with the State defendants to terminate a portion of the injunction.

Two groups of individuals intervened to oppose the United States' and State defendants' joint motion to terminate. Those individuals were (1) Eugene Crum, Sylvia S. Adams, Charles E. Archie, Jr., Carolyn Ball, Carol Banks, David Barley, John Bradford, Milton Burton, Pauline Burton, Dorothy C. Carson, Lynn Carter, Clyde Chatman, Charles Chinakwe, Presley W. Coleman, Geneice Smith Crayton, Betty Crum, Grant DeWayne Culliver, Jerome Dangerfield, Velma Easterling, Venus Edwards, Mable Elliott, Cornell Ellis, Glenda Elston, Cecil Fagg, Audrey D. Finch, Samuel Foster, Terry D. Goodson, Katherine Gray-Armster, Brenda Dianne Green, Ricky Grider, Romanza Hamilton, Vivian Handy, Willie Harris, Roy Hightower, Michael Hopkins, Rodney Huntley, Brenda J. Irby, Jacquelyn Jackson-Kelly, Yvonne Jennings, Gladys D. Jones, Theodore Jones, Willie N. Kelly, Deborah Lumpkin, Eddie McCoy, Franklin McMillion, Sr., Kathy Mathews, Roosevelt Mays, Alva Moore, Annie Moore, Wilson Morgan, Benny Newton, Herman Powell, Samuel Price, Laneeta Roberts, Shelia Russell, Layan Said, Annie F. Smith, Robert L. Smith, Lee M. Taylor, Robert Taylor III, Earl Vaughn, Carrie Warren,

Marie Wilson, Tamblyn Witherspoon, Darrell B. Wright, and Earnest Wright; and (2) Johnny Reynolds, Peggy Allen, Martha Boleware, Jeffery Brown, Ouida Maxwell, Cecil Parker, Robert Johnson, and Frank Reed.

Neither any of the Petitioners nor the Respondent is a corporation or has issued any stock that is owned by any publicly traded company.

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The opinion of the district court assessing fees (App. 7a) is reported at ___ F.Supp.2d ___, 2007 WL 2725264 (M.D. Ala. Sept. 17, 2007).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 18, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reprinted in the appendix to this petition: 42 U.S.C. §1988(b) and 42 U.S.C. §2000e-5(k).

STATEMENT OF THE CASE

This case presents an important question that has divided the circuits: Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes? Here, that question arose when an intervenor, respondent Timothy Pope, sought and obtained an attorney's-fee award against certain Alabama state agencies and officials following a successful effort—jointly prosecuted by Pope and those same

state agencies and officials—to modify an injunction pursuant to which a federal district court has been supervising the employment practices of Alabama government departments for nearly 40 years.

A. The *Frazer* Litigation And The No-Bypass Rule

In 1968, the United States brought an enforcement action in federal district court against the Alabama State Personnel Board and the heads of several state agencies (hereinafter, "the State" or "the State defendants") alleging a pattern or practice of racial discrimination in employment. The district court found the State defendants liable and entered a comprehensive injunction to remedy the unlawful discrimination. *See United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970). By subsequent orders entered in 1973 and 1976, the injunctive relief was extended to virtually all state agencies. *See United States v. Frazer*, 1976 WL 729 (M.D. Ala. 1976).

As the Eleventh Circuit explained below, the injunction entered by the district court in *Frazer* established "an extensive remedial framework to redress discrimination." App. 2a. Among the injunction's many specific provisions, one came to be known as the "No-Bypass Rule." That rule generally prohibited state agencies making hiring and promotion decisions from "appoint[ing] or offer[ing] a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant." *Frazer*, 317 F. Supp. at 1091.

B. Termination Of The No-Bypass Rule

The No-Bypass Rule operated continuously and without court review for some 37 years—until, in the litigation that underlies the attorney's-fee request in this case, the district court preliminarily suspended and then permanently terminated it. Because a proper understanding of the Question Presented here requires familiarity with the history of the No-Bypass Rule's termination, we set the stage in some detail below. All material facts are undisputed.

1. *Development of the Evidentiary Record.* To begin with, as the Eleventh Circuit acknowledged in its decision, it is "undisputed" that "the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene" in the *Frazer* action. App. 2a (emphasis in original). In particular, the State hired experts who prepared a "detailed (and costly) statistical analysis of the racial composition and recent racial hiring patterns in the Alabama public workforce." *Id.* The project consumed the full-time efforts of several economists, computer programmers, and research associates over a two-month period at a cost of several hundred thousand dollars to the State. Doc. 748, Ex. A, ¶¶4-5 (Aff. of A. Byrne). In their analyses, the State's experts found that there had been a substantial increase in the representation of black employees in the State workforce during the life of the No-Bypass Rule; that the increase was particularly significant among managers and supervisors; and that the rate of selections of black candidates from civil-service registers exceeded the predicted number of such selections. *Id.* ¶5.

Based on these findings, the State defendants discussed with other State officials a proposal to terminate the No-Bypass Rule. *Id.* ¶6. In addition, "[o]n 11 February 2003, the State defendants began discussions with the United States about the results of the statistical analysis and proposed to file a joint motion to terminate the No-bypass rule on the grounds that the problems addressed in the Frazer litigation had been remedied." App. 2a.

2. *Pope's Intervention and the Motions To Terminate.* In late February 2003, while the State's discussions with the United States were ongoing, Pope, a white state employee whose promotion had been rescinded as violative of the No-Bypass Rule,[1] moved to intervene in the *Frazer* action "for the purpose of seeking modification or vacation of certain portions of the [district court's] injunctive orders." Doc. 605, p.1. The district court took no immediate action on Pope's motion.[2]

On May 20, 2003, following a thorough review of the evidence developed by the State's experts, the United

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[1] Pope sued separately, alleging that the State had violated Title VII and the Equal Protection Clause by rescinding his promotion. A federal district court recently rejected Pope's claims. *See Pope v. Alabama*, No. 2:03cv199-ID, 2008 WL 2874483 (M.D. Ala. July 24, 2008). Pope has appealed.

[2] The issue of how Pope came to intervene is disputed. The State defendants introduced an affidavit from the Personnel Department's general counsel attesting that Pope's counsel told her "in unambiguous terms" that he was intervening in the case in order to "claim-jump" the State and "hijack[] the litigation to obtain attorney's fees." Doc. 748, Exh. 1, ¶8. Pope's lawyer countered with his own affidavit, in which he denied the claim-jumping allegation and testified that he was independently pursuing Pope's claim without knowledge of the State defendants' ongoing work. Doc. 750, Exh. A, ¶¶3, 7-8. This dispute is immaterial to the Question Presented.

States (as the original plaintiff) and the State defendants jointly moved to terminate the No-Bypass Rule on the ground that the "discriminatory practices requiring the implementation of the No-Bypass Rule have ceased and the effects of such practices have been remedied." Doc. 634, pp.1-2. The United States and the State defendants also filed briefs opposing Pope's intervention as unnecessary; his interests, they said, "were adequately represented by the existing parties." App. 3a. As the State explained, "[Pope's] interest and the interest of the present parties are identical—both Pope and the current parties to this action seek to terminate the rule." Doc. 633, p.2; *accord* Doc. 632, p.4 (U.S. Brief) ("Pope seeks to terminate the no-bypass rule. The existing parties seek to terminate the no-bypass rule."). Thus, from the very outset of this litigation, the interests of the United States, the State defendants and Pope have, as relevant here, been squarely aligned.

In response to the United States' and the State defendants' joint motion to terminate, two groups of black plaintiffs in ongoing employment suits against the State—whom we will call the "*Crum-Reynolds*" parties after the styles of their cases—also moved to intervene in the *Frazer* litigation, specifically to oppose the No-Bypass Rule's termination. Docs. 637, 638.

The district court thereafter ordered the "proposed intervenors"—*i.e.*, Pope and the *Crum-Reynolds* plaintiffs—to "show cause ... why the joint motion to terminate" filed by the United States and the State defendants "should not be granted." Doc. 640, p.1. The would-be *Crum-Reynolds* intervenors filed briefs opposing the joint motion. Docs. 651, 652. Pope, still a putative intervenor, filed a brief "in support of the Joint Mo-

tion," which he argued "should be granted." Doc. 648, p.1.

Following a period of inactivity, in January 2004—roughly eight months after the United States and the State defendants had jointly moved to terminate the Rule—the district court permitted both Pope and the *Crum-Reynolds* parties to intervene. Docs. 655, 656, 661. Pope then "filed a complaint-in-intervention and a motion seeking, essentially, to terminate the no-bypass rule," App. 8a, and in so doing "joined the United States and the State defendants in their termination motion," App. 22a; App. 27a-28a (same). Some six weeks later, the *Crum-Reynolds* intervenors also filed complaints-in-intervention; they urged the district court to "[d]eny all requests to vacate or modify" the No-Bypass Rule. Doc. 666, p.25; Doc. 667, p.18. Notably, *all* intervenors—both Pope on one side and the *Crum-Reynolds* parties on the other—asked the district court (using the very same words, verbatim) to "[g]rant the plaintiff-intervenors an award of all costs and expenses, including an award of reasonable attorney's fees." Doc. 659, p.10; Doc. 666, p.26; Doc. 667, p.19.

After the parties engaged in discovery concerning the State defendants' statistical evidence, the district court in April 2005 entered an order requiring the parties to show cause why "plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule and plaintiff-intervenor Timothy Pope's motion to modify injunction as to the no-bypass rule should not be treated as also requests for preliminary relief" and granted. App. 31a. In so doing, the district court emphasized that as a "race-conscious provision" the No-Bypass Rule "must meet 'strict scrutiny' standards and must be 'narrowly tailored'" and, further,

that "the evidentiary record submitted by [the] United States and the state defendants shows a strong likelihood that, when all is said and done, the rule cannot continue." App. 29a (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)). Accordingly, the court held, there was a "strong likelihood ... that the United States, the state defendants, and Pope will prevail on the merits of their motions" to terminate. App. 30a.

3. *Suspension and Termination of the No-Bypass Rule.* In an order dated May 20, 2005, the district court concluded that "the State defendants and Pope have established 'that a significant change in circumstances warrants' a suspension of the no-bypass rule." App. 32a-33a (quoting *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383 (1992)). Accordingly, the court converted the United States' and State defendants' joint motion to terminate into a motion for preliminary relief and granted it, thereby temporarily suspending the Rule's operation. App. 34a. The district court simultaneously granted Pope's motion seeking identical relief. *Id.*

The State defendants and Pope thereafter filed separate summary-judgment motions seeking permanent termination of the No-Bypass Rule. In an opinion issued June 30, 2006, the district court granted those motions, as well as the United States' and State defendants' May 2003 joint motion to terminate and Pope's January 2004 motion to modify. App. 24a-25a. In finding that "there ha[d] been a 'significant change in [factual] circumstances'" and that "termination of the no-bypass rule [was] 'suitably tailored' to these changed circumstances," the court pointed, specifically, to the statistical evidence developed by the State defendants, which established that during the 35-year life of the Rule, there had been

both a substantial increase in the representation of African-Americans in the State workforce and a significant redistribution of African-Americans into higher paying jobs. App. 22a-23a (quoting *Rufo*, 502 U.S. at 383).

C. Pope's Motions For Attorney's Fees

Claiming to be a "prevailing party" within the meaning of 42 U.S.C. §1988(b) and Title VII's fee-shifting provision, 42 U.S.C. §2000e-5(k), Pope sought attorney's fees totaling more than $105,000 from the State defendants. Initially, after the district court preliminarily suspended the No-Bypass Rule, Pope moved for an "interim award" of attorney's fees. Doc. 740. The State defendants objected on the ground that they had never "opposed [Pope's] motion to terminate the no-bypass rule" and, to the contrary, had filed their own "joint motion with the original Plaintiff United States to terminate" the Rule. Doc. 748, p.2. Accordingly, the State defendants contended, whatever else his status, Pope was "not a 'prevailing party' *vis-à-vis*" them. *Id.* When Pope later filed a supplemental fee petition after the district court permanently terminated the No-Bypass Rule, *see* Doc. 781, the State defendants again protested that their interests were squarely aligned with Pope's, that they had prevailed on the termination issue, and, therefore, that they were not losing parties liable for fees, *see* Doc. 782.[3]

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[3] Pope did not seek attorney's fees from the *Crum-Reynolds* intervenors—the only losing parties to speak of—presumably because he doubted he could show that their position was "frivolous, unreasonable, or without foundation," as required by this Court's decision in *Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989).

D. The District Court's Fee Opinion

The district court granted Pope's fee petitions in part. App. 7a-20a. The court rejected the State defendants' core argument that Pope was not a "prevailing party" *vis-à-vis* them because their interests were aligned with his and because they had prevailed on the termination issue. App. 13a. The court found that because Pope had "achieved a sought-after 'judicially sanctioned change in the legal relationship of the parties'" he was *ipso facto* a prevailing party, even as against the State. *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001)). The facts that the parties were aligned and that the State defendants had themselves prevailed were, in the district court's view, irrelevant: "While Pope may not have achieved the sought-after change by himself, he still achieved it. Pope is a prevailing party." *Id.*

Having summarily concluded that Pope was entitled to fees—and, more to the point, that the State defendants were liable for them—the district court spent some nine pages sifting through disputed evidentiary submissions in an attempt to fix the amount of the award. In doing so, the district court focused principally on "whether Pope made a separate contribution to the litigation, and, if so, what it was." App. 14a. Accordingly, the court sought to determine the timing of each party's involvement, to parse the subtle distinctions between the parties' legal arguments, and to measure when and to what extent the court's own analysis was "driven more" by one party's submissions or the other's. App. 14a-20a. As a result of this fact-intensive investigation, the district court concluded that Pope was entitled to 70% of the fees claimed in connection with the preliminary-

suspension phase of the litigation and 40% of those claimed in connection with the permanent-termination phase, for a total of $61,499.70. App. 17a-20a.

E. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed. Like the district court, the Eleventh Circuit rejected the State defendants' contention that they were not liable for fees because Pope was not a "prevailing party vis-à-vis [them]" and, in particular, because "the interests of the State and Pope were aligned" and "both parties were successful in their efforts to terminate the No-bypass rule." App. 3a. All that mattered, the court of appeals held, was that "[a]s a consequence of litigation acts taken by Pope and the State defendants, the No-bypass Rule ha[d] been terminated judicially" and that, accordingly, Pope had obtained a "'judicially sanctioned change in the legal relationship of the parties'" App. 4a (quoting *Buckhannon*, 532 U.S. at 605). That alone was enough to make Pope a "prevailing party," even as against the aligned, prevailing State defendants. *Id.* at 4a-5a.

In dismissing the State's argument, the Eleventh Circuit refused, in its words, "to engraft" onto federal fee-shifting statutes "a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status." App. 5a. Despite the State's reliance on cases (of which more below) from the Second, Seventh, and D.C. Circuits expressly holding that aligned, prevailing parties cannot be made liable for attorney's-fee awards, the Eleventh Circuit held that there is "nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing pos-

ture." *Id.*[4] The court of appeals went on to affirm the district court's determinations that Pope had "made a separate contribution to the litigation" and that no "special circumstances render[ed] a fee award unjust," as well as its calculation of the fee amount. App. 5a-6a.

REASONS FOR GRANTING THE PETITION

Over the course of the last 40 years, this Court has given careful attention to the meaning of the term "prevailing party" as used in scores of federal fee-shifting statutes. In a series of decisions—beginning with *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), and culminating with *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)—the Court held that to qualify for a fee award, a party must "'succeed on [a] significant issue in litigation which achieves some of the benefit the part[y] sought'" in the case, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted), and, in so doing, must obtain a "judicially sanctioned change"—by way of either a court judgment or consent decree—"in the legal relationship of the parties," *Buckhannon*, 532 U.S. at 605.

To this point, the Court's attention has almost uniformly been focused on the party *seeking* fees. The question here is whether the term "prevailing party" can be defined wholly without regard to the other side of the "*v.*" Who, in other words, is liable to *pay* attorney's fees

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[4] The Eleventh Circuit distinguished an in-circuit decision cited by the State, *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986). Unlike this case, in which the State took sides (as it turned out, the winning side) and litigated forcefully, the defendants in *Reeves* "remained neutral" with respect to the contested issue. App. 5a n.2.

under federal fee-shifting statutes? And in particular, is it only losing parties who are subject to fee awards, or can a litigant whose interests are aligned with the fee seeker's (and who therefore itself "prevail[s]" in the litigation) also be put on the hook? That question has received scant attention from this Court, and the uncertainty has spawned a circuit split: The Eighth and Eleventh Circuits allow the assessment of fee awards against aligned, prevailing parties, while the Second, Seventh, and D.C. Circuits require adverseness (or, what amounts to the same thing, a *loss*) as a prerequisite to fee liability.

The Question Presented significantly affects real-world, on-the-ground litigation under a whole host of federal statutes. This Court should step in now to provide necessary guidance to plaintiffs, defendants, and intervenors, as well as to the practicing bar.

I. The Eleventh Circuit's Decision Deepens An Existing Circuit Split.

In arguing to the Eleventh Circuit that "the prevailing party requirement is not met when the interests of both parties are aligned and both seek the same ultimate objective in the litigation," the State defendants cited, among other supporting authorities, on-point decisions of the Second, Seventh, and D.C. Circuits. Br. of Appellants at 21, 27-29, *Flowers v. Pope*, No. 07-14854 (Dec. 7, 2007). The Eleventh Circuit, however, expressly rejected the State's contention: "The State defendants seek to engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status. But we see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." App. 5a. In so

holding, the Eleventh Circuit deepened an existing circuit split that now warrants this Court's attention. *See* Sup. Ct. R. 10(a).

A. The Second, Seventh, And D.C. Circuits Have Adopted A "Loser-Pays" Rule That Precludes Fee Awards Against Aligned, Prevailing Parties.

The Second, Seventh, and D.C. Circuits have all held that attorney's fees may not be assessed against a litigant who is aligned with—and who prevails to the same extent as—the party seeking the fees. Those courts, in other words, have all adopted what amounts to a "loser-pays" rule to govern fee awards.

1. In *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), the Second Circuit disallowed a plaintiff's request for attorney's fees pertaining to a particular issue with respect to which the plaintiff's and defendant's interests were aligned. *Firebird Society* arose out of a Title VII suit brought by black firefighters against the City of New Haven's fire commissioners challenging the fire department's employment practices. After the case was resolved by consent decree, a separate group of firefighters moved "to intervene and set aside the consent order." *Id.* at 643. Their intervention "was successfully resisted"—significantly, "not only by the appellant [black firefighters] but by the appellee [fire commissioners] as well." *Id.* The Second Circuit rejected as "clearly without merit" the black firefighters' claim "that counsel fees should be assessed against the appellees for services opposing the intervention." *Id.* at 644. In particular, the court reasoned as follows: "The appellees joined in opposing intervention and as to that issue were as much

prevailing parties as the appellants. There is no viable theory advanced which would permit the recovery of legal fees and costs in these circumstances." *Id.*; *see also* 2 Alba Conte, *Attorney Fee Awards* § 11:3, at 647-48 n.41 (3d ed. 2004) (In *Firebird Society* "[f]ees were denied ... for time spent in successfully opposing motions to intervene when filed by persons who challenged the settlement because the defendant also prevailed on this issue.").[5]

2. The D.C. Circuit has likewise adopted a loser-pays rule and held that alignment precludes attorney's-fee liability. In *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), the court addressed a fee request arising out of litigation concerning the regulation of cigarette smoking aboard commercial aircraft. Having successfully challenged Civil Aeronautics Board regulations as insufficiently protective of the rights of non-smoking airline passengers, the public-interest group Action on Smoking and Health ("ASH") sought and obtained attorney's fees under the Equal Access to Justice Act, which, like so many other fee-shifting statutes, authorizes fee awards to "prevailing part[ies]." 28 U.S.C. §2412(d)(1)(A). Significantly for present purposes, however, the D.C. Circuit disallowed the portion of the fee award attributable to ASH's "work supporting the Board's position against [an industry] intervenor's claim that the Board had no power to regulate smoking aboard aircraft." *ASH*, 724 F.2d at

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[5] *Cf. Association for Retarded Citizens of Conn., Inc. v. Thorne*, 68 F.3d 547, 552 (2d Cir. 1995) ("There is no basis in law or logic for a prevailing party to recover attorneys' fees from a party other than the entity whose behavior has been positively influenced by litigation and *against whom the plaintiffs have prevailed.*" (emphasis added)).

216. Notwithstanding ASH's contention that it had made a separate contribution to the litigation—that "it alone cited a precedent which [the D.C. Circuit had] relied upon in its [earlier] opinion" rejecting the intervenor's contention—the court "agree[d] with the Board that ASH cannot be considered a 'prevailing party' on an issue on which both ASH and the government took the same position." *Id.* Notably, in so holding, the D.C. Circuit cited the Second Circuit's *Firebird Society* decision for support. *Id.* at 216 n.19.[6]

3. The Seventh Circuit, too, has expressly embraced an adverseness/loser-pays prerequisite to attorney's-fee liability. In *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), the Seventh Circuit affirmed a district court's denial of plaintiffs' request for fees from the defendant for time spent in opposing a separate intervenor's appeal. Briefly, the *Bigby* litigation unfolded as follows: A class of black police officers sued the City of Chicago under Title VII alleging that a test used for departmental promotions was racially biased. A class of white officers intervened to support the test. The black plaintiffs prevailed, and the district court imposed hiring and promotion quotas but permitted the City to continue to make promotions from the challenged list until a new test could be devised. *See id.* at 1427. Several years later, the district court enjoined the City, still without a nondiscriminatory test, from making further promotions from the old list. When the City thereafter sought leave

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[6] *See also Synar v. United States*, 670 F. Supp. 410, 413-14 (D.D.C. 1987) (citing *ASH* and holding in an EAJA case that "[i]t cannot be stated with accuracy that plaintiffs 'prevailed' over the United States" where "both plaintiffs and the United States *agreed* upon the 'winning' issue of the case" and, therefore, that "the prevailing legal issue was put forth by *both* parties" (emphasis in original)).

to continue making promotions, the district court refused. The white intervenors appealed the district court's refusal, but the City did not. The City, rather, "appeared as an appellee in the ... intervenors' appeal" alongside the black plaintiffs and, with them, succeeded in getting the appeal dismissed. *Id.* at 1429.

The Seventh Circuit refused the plaintiffs' subsequent request under 42 U.S.C. §2000e-5(k) for fees based on their time spent opposing the intervenors' appeal. Its reasoning applies here jot for jot:

> In this instance, the Bigby plaintiffs are not prevailing parties as against the City on the appeal by the [white] intervenors. ... Since the Bigby plaintiffs and the City each argued that the appeal by the [white] intervenors was improper, the Bigby plaintiffs cannot be characterized as prevailing parties vis-à-vis the City with respect to the dismissal of the appeal. The City was as much a prevailing party when the appeal was dismissed as were the Bigby plaintiffs; therefore, the Bigby plaintiffs do not qualify for an award of attorney's fees under §2000e-5(k).

Bigby, 927 F.2d at 1429. Significantly, in support of its holding, the *Bigby* court cited the D.C. Circuit's *ASH* decision for the proposition that a "plaintiff [is] not considered a prevailing party on an issue upon which it took the same position as the defendant." *Id.*

B. The Eighth And Eleventh Circuits Have Rejected A "Loser-Pays" Limitation And Permit Fee Awards Against Aligned, Prevailing Parties.

In stark contrast to the loser-pays rule that governs attorney's-fee requests in the Second, Seventh, and D.C. Circuits, the Eighth and Eleventh Circuits both permit fee awards against parties who are aligned with—and prevail to the same extent as—the fee seeker.

1. As already described in some detail, in the decision below the Eleventh Circuit expressly rejected a loser-pays limitation on fee liability. The court found the State liable for fees by focusing exclusively on Pope as the fee seeker, and ignoring entirely the status of the State as would-be fee payer. "As a consequence of litigation acts taken by Pope and the State defendants," the Eleventh Circuit reasoned, "the No-bypass rule has been terminated judicially." App. 4a. Because he obtained—albeit with the State's unconditional support—a "'judicially sanctioned change in the legal relationship of the parties,'" the court found that "Pope was a prevailing party" entitled to fees. *Id.* (quoting *Buckhannon*, 532 U.S. at 605). The court rejected the State defendants' position that Pope was not a "prevailing party vis-à-vis" them because "the interests of the State and Pope were aligned" in that "both parties were successful in their efforts to terminate the No-bypass rule." App. 3a. The court refused, in its words, to "engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status." App. 5a. "[W]e see nothing in the language of section 1988," the court held, "that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." *Id.* The Elev-

enth Circuit thus concluded that federal fee-shifting statutes do not entail a loser-pays limitation and that even aligned, prevailing parties can be liable for fee awards.

2. In so holding, the Eleventh Circuit joined the Eighth Circuit, which had earlier determined that attorney's fees can be assessed against aligned, prevailing parties. *Jenkins v. Missouri*, 73 F.3d 201 (8th Cir. 1996), arose out of protracted school-desegregation litigation in which black students from an urban school district had alleged that they were denied admission to another district on the basis of race. After the case shuffled back and forth between the district and appellate courts for several years, the district court eventually approved a remedy crafted by a court-appointed Desegregation Monitoring Committee. The black plaintiffs and the government defendants were united in their opposition to the proposed remedy, which involved, in part, electronic communications between urban and suburban students. They jointly "appealed from the entry of the [remedial] order" and succeeded in convincing the Eighth Circuit to vacate. *Id.* at 202. The black plaintiffs then sought attorney's fees from the State for the plaintiffs' "role in opposing the [remedial] program" on appeal. *Id.* The district court awarded fees, and held, specifically, that under Eighth Circuit precedent "whether the State opposed the [remedial] program was not a relevant factor in deciding whether to award fees." *Id.*

In affirming, the Eighth Circuit squarely rejected the State's contention that "the district court could not award the Jenkins class fees against the State for opposing the [remedial] plan, since the State as well as the Jenkins class opposed the plan." *Id.* at 204. In so doing, the Eighth Circuit likewise rejected the State's reliance

on, among others, the Second Circuit's *Firebird Society* decision, the D.C. Circuit's *ASH* decision, and the Seventh Circuit's *Bigby* decision: "If these cases hold that a court can only award attorneys' fees against a defendant if the fees were incurred directly litigating against the defendant, they conflict with" existing Eighth Circuit precedent. *Id.* The Eighth Circuit held that the policies supporting fee awards in institutional-reform cases applied "despite the fact that the State joined the Jenkins class in opposing" the remedial plan. *Id.*

* * *

The circuit split here is clear, mature, and acknowledged. Moreover, it is most unlikely that the split will resolve itself, given that courts most recently weighing in—the Eighth and Eleventh Circuits—have rejected the majority view and held that aligned, prevailing parties *can* be liable for fees. Finally, as we explain in some detail below, uncertainty in the attorney's-fees realm is particularly troublesome inasmuch as it encourages the proliferation of fee-related "second major litigation[s]" of the sort this Court has condemned. *Hensley*, 461 U.S. at 437. This Court should grant certiorari to resolve the conflict.

II. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Concerning Fee Liability And Frustrates The Policies That Underlie Federal Fee-Shifting Statutes.

The circuit split is reason enough to grant certiorari. Review here is particularly appropriate, however, because the Eleventh Circuit's decision is wrong: It conflicts with statements in this Court's opinions and un-

dermines basic principles of systemic efficiency and fundamental fairness.

A. This Court's Decisions Indicate That Aligned, Prevailing Parties Are Not Liable For Attorney's Fees.

In addition to exacerbating a circuit split, the Eleventh Circuit's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Although this Court has never said so expressly—hence the division among the lower courts—its entire attorney's-fees jurisprudence rests on the assumption that federal fee-shifting statutes codify a loser-pays system.

In assessing fees against aligned, prevailing parties, the Eleventh Circuit found it dispositive that 42 U.S.C. §1988 does not on its face forbid that result: "[W]e see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture." App. 5a. But this Court has rejected such a wooden interpretation of federal fee-shifting statutes. For instance, addressing Title VII's fee-shifting measure in *Independent Federation of Flight Attendants v. Zipes*, the Court emphasized that "[a]lthough the text of the provision does not specify any limits upon the district courts' discretion to allow or disallow fees, in a system of laws discretion is rarely without limits." 491 U.S. 754, 758 (1989) . More particularly, the Court said that "[i]n the case of [42 U.S.C. §2000e-5(k)] and other fee-shifting statutes"—expressly including §1988—"we have found limits in 'the large objectives' of the relevant Act, which embrace certain 'equitable considerations.'" *Id.* at 758-59 (citations omitted).

One of those "limits," this Court's decisions clearly indicate, is that only *losers* are liable for attorney's fees. *Kentucky v. Graham*, 473 U.S. 159 (1985), provides perhaps the clearest signal to that effect. The question there was whether §1988 authorizes an award of fees against a government entity when a plaintiff prevails in a personal-capacity suit against government employees. In answering no, the Court (anticipating its later *Zipes* decision) acknowledged that "Section 1988 does not in so many words define the parties who must bear" attorney's fees. *Id.* at 164. Nonetheless, the Court added immediately, "it is clear that the logical place to look for recovery of fees is to the *losing party*—the party legally responsible for relief on the merits." *Id.* at 165 (emphasis added). "Thus," the Court concluded, "where a defendant has not been *prevailed against*, either because of legal immunity or on the merits, §1988 does not authorize a fee award against that defendant." *Id.* (emphasis added); *accord id.* at 168 ("That a plaintiff has prevailed against one party does not entitle him to fees from another party ...."). Even though the plaintiffs there had prevailed on their underlying claim (excessive force) against various government employees (police officers), they had not "prevailed against" the State so as to make the State itself liable for fees.

Accordingly, the Eleventh Circuit's concluding observation that there is "nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture" (App. 5a) actually concludes nothing at all. This Court made precisely the same observation in *Graham*—that "Section 1988 does not in so many words define the parties who must bear" attorney's fees—and yet went on to hold that because the State was

not a "losing party" who had been "prevailed against," it was not liable for fees. 473 U.S. at 164-64. *Graham* thus clearly indicates that adverseness, *i.e.*, losing and being prevailed against, is an essential prerequisite to statutory fee liability. And by definition, a party (like the State here) whose interests are precisely aligned with those of the fee seeker and who obtains the very relief it requests has neither lost nor been prevailed against.

Graham reflects an assumption that underlies this Court's entire attorney's-fees jurisprudence. From the very beginning, this Court's opinions have indicated that federal fee-shifting statutes establish a loser-pays system. For instance—

- In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court described the "American rule"—to which fee-shifting statutes are exceptions—as prescribing that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee *from the loser*." 421 U.S. 240, 247 (1975) (emphasis added).

- In *Monell v. Department of Social Services of New York*, the Court summarized §1988 as "allow[ing] prevailing parties ... in §1983 suits to obtain attorney's fees from the *losing parties*." 436 U.S. 658, 698 (1978) (emphasis added).

- In *New York Gaslight Club, Inc. v. Carey*, the Court remarked that Title VII's fee-shifting provision "subject[s] the *losing party* to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings." 447 U.S. 54, 61 (1980) (emphasis added).

- In *Zipes*, the Court repeatedly referred to those liable for fee awards as "losing defendant[s]." 491 U.S. at 759, 761 (emphasis added).

- In *Venegas v. Mitchell*, the Court observed that "§1988 controls what the *losing defendant* must pay ...." 495 U.S. 82, 90 (1990) (emphasis added).

- In *West Virginia University Hospitals, Inc. v. Casey*, the Court considered the question whether expert fees could "be shifted to the *losing party* pursuant to" §1988 and characterized *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), as holding that paralegal and law-clerk time could be "charged to the *losing party*." *Casey*, 499 U.S. 84, 99 (1991) (emphasis added).

In the same way (and to the same effect), this Court's decisions have recognized an adverseness prerequisite to fee liability under federal fee-shifting statutes. For instance—

- In *Christiansburg Garment Co. v. EEOC*, the Court prescribed the circumstances in which "a plaintiff [can] be assessed his *opponent's* attorney's fees" under Title VII's fee-shifting provision. 434 U.S. 412, 422 (1978) (emphasis added).

- In *Blum v. Stenson*, the Court observed that a "prevailing party in a §1983 case" may be "entitled to an award of attorney's fees from [his] *adversary*." 465 U.S. 886, 901 n.17 (1984) (emphasis added).

- In *Evans v. Jeff D.*, the Court referred to "a defendant's liability for his *opponent's* attorney's

fees" under §1988. 475 U.S. 717, 736 (1986) (emphasis added).

- In *Gisbrecht v. Barnhart*, the Court summarized §1988 as "allow[ing] a 'prevailing party' to recover from his *adversary* 'a reasonable attorney's fee as part of the costs.'" 535 U.S. 789, 792-93 (2002) (emphasis added).

Not surprisingly, government reports, academic treatises, and other secondary sources reflect the same basic assumptions: that federal fee-shifting statutes entail an adverseness requirement and subject only losing parties to attorney's-fee awards and, conversely, that aligned, prevailing parties are not liable for fees. *See, e.g.*, Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 16 (Federal Judicial Center, 2d ed. 2005) ("Any *losing defendant*, including the government or government officials, can be liable for fees." (emphasis added)); *id.* at 1 ("Congress enacted statutes providing for the prevailing party to recover attorneys' fees *from its opponent* in particular kinds of actions." (emphasis added)); Henry Cohen, *CRS Report for Congress: Awards of Attorneys' Fees by Federal Courts and Federal Agencies* 1 (Congressional Research Service 2008) ("Under [fee-shifting statutes], a federal court ... may order the *losing party* to a lawsuit to pay the winning party's attorneys' fees." (emphasis added)); *id.* (describing fee-shifting statutes as embodying a "'loser-pays' rule"); 3 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation* §10.33, at 10-112 (4th ed. 2007) ("Attorney's fees under §1988 are awarded against the losing party ...."); 2 Conte, *supra*, §7.42, at 307 ("Attorney's fees under §1988 are assessed against losing parties ...."); Eugene Gressman, Kenneth S. Geller, et al., *Supreme Court Practice* §15.10, at 830 (9th ed. 2007)

("[A] number of statutes provide for attorneys' fees for the prevailing party against the losing party."); Ralph V. Seep, *What Persons or Entities May Be Liable To Pay Attorney's Fees Awarded Under Civil Rights Attorney's Fees Awards Act of 1976?*, 106 A.L.R. Fed. 636, 643 (1992) (noting "the general rule that the losing party pays fees").

The Eleventh Circuit's decision here—awarding fees against aligned, prevailing parties—cannot be reconciled with this Court's decisions or with the overwhelming weight of authority concerning the proper interpretation of federal fee-shifting statutes.

B. A Rule Making Aligned, Prevailing Parties Liable For Attorney's Fees Is Both Inefficient And Unfair.

A rule assessing fees against an aligned party who, alongside the fee seeker, prevails on the pertinent issue "would so 'distort' the 'fair adversary process' that Congress [sh]ould not lightly be assumed to have intended it." *Zipes*, 491 U.S. at 760 (quoting *Christiansburg Garment*, 434 U.S. at 419). In particular, such a rule would at once produce both systemic inefficiency and gross inequity.

1. This Court has emphasized that judges managing long-running and often unwieldy injunctive decrees need and expect litigants—and particularly government litigants—to shoot straight with them. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). Fee-shifting statutes, therefore, should be interpreted in a way that encourages parties to be proactive, transparent, and cooperative. Unfortunately, the Eleventh Circuit's interpretation does just the opposite. If a defendant in an insti-

tutional-litigation setting can align itself with the plaintiff on a particular issue, prevail on that issue, and yet *still* be stuck with the plaintiff's attorney's fees, the defendant will have every incentive to hide its cards or, worse, decline to participate altogether. It is common ground here that a litigant can avoid fee liability altogether by "remain[ing] neutral" on a contested issue. App. 5a; *see also, e.g.*, *Reeves v. Harrell*, 791 F.2d 1481, 1483-84 (11th Cir. 1986); *Paradise v. McHenry*, 809 F. Supp. 899, 904-06 (M.D. Ala. 1992). But when the goal is the fair and efficient resolution of a protracted dispute, neutrality—and particularly a neutrality born of pocketbook protectionism—is not the best policy. As this Court has said in an only slightly different context, "[i]t would hardly serve the congressional policy in favor of 'vigorous' adversary proceedings" to require litigants to "disguise or avoid their strongest arguments in order to escape liability for attorney's fees." *Zipes*, 491 U.S. at 766 (quoting *Christiansburg Garment*, 434 U.S. at 419). The Eleventh Circuit's rule does just that.

To its credit, the State didn't "disguise or avoid" arguments or otherwise hide the ball here. Instead, it invested several months of manpower and several hundred thousand dollars of taxpayer money into assessing the progress made under the *Frazer* decree—and then, based on the results of its investigation, helpfully (and as it turns out correctly) alerted the district court that changed legal and factual circumstances had likely rendered the decree's No-Bypass Rule invalid and, accordingly, that a modification under *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992), was in order. For its efforts in assisting the court in the management of a sprawling, 40-year-old decree—and despite its complete success—the State has now been saddled with

Pope's fees and costs in addition to its own. Particularly in the institutional-reform setting, in which the need for party participation and cooperation is paramount, litigants should be rewarded, not punished, for seeking modifications of orders that, over time, have become unsupportable.

2. Relatedly, the Eleventh Circuit's decision creates an inequitable "lose-lose" proposition that exposes defendants in multiparty litigation to fee liability no matter what their position. As matters stand, the State has been charged with Pope's attorney's fees notwithstanding the fact that the State's interests were squarely aligned with Pope's and that the State prevailed to precisely the same extent as Pope. Had the litigation turned out differently and the *Crum-Reynolds* intervenors succeeded in defending the No-Bypass Rule, they would of course (and rightly) have looked to the State, as the loser, to pay their attorney's fees. So under the Eleventh Circuit's rule, the State was truly damned if it did and damned if it didn't. (Recall that in their preliminary-injunction briefs both Pope and the *Crum-Reynolds* intervenors sought fees against the State. *See supra* at 6.) The only way for the State—and other similarly-situated defendants around the country—to protect against fee liability would be to stand mute. For reasons already explained, Congress cannot possibly have meant to encourage such sideline-sitting.

3. Finally, the Eleventh Circuit's decision will perversely incentivize interloping intervenors to insinuate themselves into existing litigation, piggyback on others' arguments, and then seek reimbursement for their attorney's fees. Whether or not Pope himself was an interloper—whether or not he intervened specifically to "claim jump" the State and "hijack[] the litigation to ob-

tain attorney's fees"[7]—is irrelevant. The chronology of events here, which is undisputed, demonstrates that the risk is real. The point is that the Eleventh Circuit's decision—which makes fees available even to an intervenor who requests the very same relief as the co-party from whom he seeks payment—will encourage opportunistic would-be intervenors to troll.

III. The Question Presented Is Important And Warrants This Court's Attention Now.

The Question Presented here, while "an intellectually interesting and solid problem," is hardly "academic or ... episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Quite the contrary, the issue at the core of this case—Who is liable to pay attorney's fees under federal fee-shifting statutes?—is one whose implications cut across numerous areas of the law and that can be expected to recur in a host of cases. It is, in short, "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).[8]

A. The Question Presented Is Jurisprudentially And Practically Significant.

1. With respect to importance, the sheer numbers tell part of the story. As an initial matter, "[a]lmost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants." Hirsch & Sheehey, *supra*, at 1; *see also* Cohen, *supra*, at i (same); *cf. Marek v. Chesny*, 473 U.S. 1, 44 (1985) (appendix to

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[7] *Supra* at 4 n.2.

[8] Reflecting the real-world importance of the Question Presented, groups of States and local governments have filed *amicus curiae* briefs in support of the petition.

opinion of Brennan, J., dissenting) (listing fee-shifting statutes). Among the more significant federal statutes that allow for fee awards to "prevailing part[ies]" are—

- the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b);
- Titles II, III, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a-3(b), 2000b-1, 2000e-5(k);
- the Voting Rights Act of 1965, 42 U.S.C. §1973l(e);
- the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A);
- the Individuals With Disabilities Education Act, 20 U.S.C. §1415(i)(3)(B);
- the Americans With Disabilities Act of 1990, 42 U.S.C. §12205;
- the Fair Housing Act, 42 U.S.C. §3613(c)(2);
- the Clean Water Act, 33 U.S.C. §1365(d); and
- the Copyright Act of 1976, 17 U.S.C. §505.

Significantly, this Court has often emphasized that in the light of their similar language it will "interpret[] these fee-shifting provisions consistently." *Buckhannon*, 532 U.S. at 603 n.4 (citing *Hensley*, 461 U.S. at 433 n.7). Accordingly, the uncertainty that exists in this case over whether an aligned, prevailing party can be assessed a co-party's attorney's fees necessarily exists in numerous other contexts, as well. The question is open, so to speak, not just for §1988 and Title VII purposes, but across the board. On the flip side, of course, any resolution of the issue that this Court might reach—either

way—would bring needed clarity to a whole host of statutory regimes. The fact that the question arises in so many different settings, and that the payoff for definitively answering it is so big, provides good reason to grant certiorari. *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 & n.1 (1983).

2. Not only does the Question Presented implicate scores of federal statutes, but it can be expected to recur frequently given the number of institutional injunctions and consent decrees presently in effect around the country. While the question of an aligned party's fee liability could surface, of course, in a whole host of contexts, it is perhaps most likely to arise in the institutional-reform setting. The reason is this: Because institutional-reform decrees "often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased." *Rufo*, 502 U.S. at 380. When those inevitable changes come, one or more parties to the decree may—as happened here—move the supervising court to modify the decree's terms. Critically, *every time* a party requests such a modification, the possibility arises under the Eleventh Circuit's rule that an individual or group will seek to intervene, ally itself with the movant, and then seek fees.

The threat is hardly hypothetical. During the last half century, there has been an extraordinary "upsurge in institutional reform litigation." *Id.* Today, institutional-reform decrees apply across the gamut of governmental programs—from corrections to housing, from education to mental-health, from environmental to personnel. *See* Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 4 (Yale 2003). Although, tellingly, "[n]o one knows how many" of these decrees actually exist, com-

mentators put the number in the "thousands." American Enterprise Institute, *Government by Consent Decree?* at 2 (June 9, 2005) (remarks of Sen. Alexander)[9]; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (referring to the "thousands of federal consent decrees that currently exist"). And, significantly, there is no sign of a slowdown; to the contrary, "[n]ew decrees get issued, piling up on the old, few of which are actually terminated." Sandler & Schoenbrod, *supra*, at 11.

3. Finally, beyond the raw numbers, there is an additional consideration that counsels certiorari here: The cost of uncertainty is particularly high in the attorney's-fees context. This Court has repeatedly lamented excess fee litigation, which Justice Brennan quite correctly described as "one of the least socially productive types of litigation imaginable." *Hensley*, 461 U.S. at 442 (Brennan, J., dissenting). Accordingly, the Court has "avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension.'" *Buckhannon*, 532 U.S. at 609 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)). The division that presently exists among the lower courts concerning aligned parties' fee liability is a veritable breeding ground for fee disputes. And the Eleventh Circuit's decision, which both exacerbates the disunity and gives a boost to the view that fees *can* be assessed against aligned parties, will likely embolden fee seekers and prompt additional fee litigation, making matters worse. The point is simply this: So long as the door is open to more parties requesting fees, more

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[9] *See* www.aei.org/events/filter.all,eventID.1078/transcript.asp.

parties will request fees. And more fee requests, of course, mean more fee litigation.

The risk that these additional fee disputes will mushroom into "second major litigation[s]," *Hensley*, 461 U.S. at 437, is very real. Because the amount that plaintiffs and intervenors can recoup from aligned defendants will necessarily be tied to the nature and extent of their contributions to the relief obtained, they will nearly *always* find it necessary to engage in "major" fee-related litigation. Reviewing courts will have to scrutinize the coparties' arguments and pleadings to determine, for instance, who was the driving force behind the litigation, who was more (or less) responsible for obtaining the desired relief, and whether one party tried to "claim jump" the other. Those inquiries, in turn, may well necessitate discovery concerning the parties' subjective intentions in filing and pursuing their claims, their communications with one another, and the timing of their key strategic decisions. All of which, of course, will only protract and complicate the already-protracted and complicated litigation concerning the amount of any fee award—and, as happened here, lead to yet a third, "fees on fees" round of litigation. (Pope recently sought and obtained in the Eleventh Circuit a $22,000 fee award for time spent litigating the State's liability for fees.) Fear of such open-ended and "factbound" inquiries—into "the nature and timing" of parties' actions, the "subjective motivations" underlying those actions, etc.—is precisely what led this Court to reject the "catalyst theory" of fees in *Buckhannon*. 532 U.S. at 609-10. The very same considerations are at work here.

The district court's fee opinion here vividly illustrates the problem. The court spent all of a single paragraph in determining that Pope was—despite the parties' align-

ment—a "prevailing party" *vis-à-vis* the State. App. 13a. The court then spent the next *nine pages* trying to determine "whether Pope made a separate contribution to the litigation, and, if so, what it was"; to nail down the timing of each party's involvement; to parse in detail the relatively minor differences between the parties' precise legal arguments; and to gauge the effect of each party's contentions on the court's own decisionmaking process. App. 14a-20a. The district court's analysis is chock full of rules, exceptions, exceptions to exceptions, percentages, tables, tallies, etc.

The point here is not to quibble with the number the district court picked; as the Eleventh Circuit correctly observed, the State does not "challenge ... the district court's attorney's fee calculation" as such. App. 4a. The point is simply that the uncertainty sown by the Eleventh Circuit's decision will only encourage more—and more laborious—"satellite litigation" about fees. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 408 (1990). And that is not a good thing.

This Court should step in now to provide necessary clarity and thereby reduce the needless fee litigation that will continue (and likely snowball) so long as the conflict in the lower courts festers.

B. This Case Presents An Ideal Vehicle For Answering The Question Presented.

For at least three reasons, this case presents an ideal vehicle for answering the Question Presented and resolving the longstanding circuit split.

1. The case presents a pure legal issue; there are no factual disputes that might complicate the Court's consideration. The State defendants have consistently

maintained that "as a matter of law" they are not liable for fees, App. 3a, 4a, either as a *per se* matter or because alignment constitutes a "special circumstance" that precludes a fee award, App. 5a-6a. The Eleventh Circuit held, likewise "as a matter of law," that they are liable. App. 5a. With respect to the Question Presented—whether an aligned, prevailing party is liable to pay a co-party's attorney's fees—only two facts in this case matter: (1) that Pope successfully moved to terminate the No-Bypass Rule; and (2) that the State defendants did, too. Alignment—or the absence of adverseness—is the only pertinent fact, and it is uncontested.

2. The Question Presented, while extraordinarily important to the workaday world of litigation, is, within the context of this case, discrete. Again, the State defendants "offer no challenge to the district court's attorney's fee calculation"; instead, they argue simply "that as a matter of law no attorney's fees may be awarded" against an aligned, prevailing party. App. 4a. Accordingly, the Court needn't concern itself with the fact-intensive, multipart balancing tests used to determine fee amounts. It needs only to focus on a straight question of statutory interpretation.

3. The Eleventh Circuit's resolution of the Question Presented—to allow assessments of fees against aligned, prevailing parties—was unquestionably outcome-determinative. Had the Eleventh Circuit applied the Second, Seventh, and D.C. Circuit precedent cited to it by the State defendants, it would have denied Pope's fee request outright.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Alice Ann Byrne
ALABAMA DEPT. OF PERSONNEL
64 North Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Matthew H. Lembke
John C. Neiman, Jr.
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Christopher W. Weller
CAPELL & HOWARD, P.C.
150 South Perry Street
Montgomery, AL 36102

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United States Court of Appeals, Eleventh Circuit.
UNITED STATES of America, Plaintiff,
Timothy D. Pope, Intervenor-Plaintiff-Appellee,
Johnny Reynolds, et al., Intervenor-Plaintiffs,
v.
Thomas G. FLOWERS, et al., Defendants,
State of Alabama Personnel Department, Defendant-Appellant.
No. 07-14854
Non-Argument Calendar.

June 18, 2008.

Before EDMONDSON, Chief Judge, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Defendants-Appellants, the Alabama State Personnel Board, other Alabama State Departments and named State employees (collectively the "State defendants"), appeal an award of attorney's fees to Intervenor-Appellee, Timothy D. Pope. No reversible error has been shown; we affirm.

In 1968, the United States brought an enforcement action against the State defendants alleging a pattern or practice of racial discrimination in employment. In 1970, the district court found the defendants liable and entered injunctive orders designed to remedy the illegal discriminatory practices. *See United States v. Frazer*, 317

F. Supp. 1079 (M.D. Ala. 1970) (the "Frazer litigation"). Those injunctive orders set out an extensive remedial framework to redress discrimination. Part of that framework became known as the Frazer No-bypass Rule: Alabama state officials were prohibited from bypassing a higher ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. The Frazer No-bypass Rule remained in effect for over thirty years without court review or reauthorization.

Timothy Pope is a white employee of the Alabama Department of Corrections. In September 2002, Pope was offered a promotion but that promotion was rescinded as violative of the No-bypass Rule. Pope filed a race discrimination charge, received a right-to-sue letter, and is the plaintiff in a Title VII case pending in district court. In addition to his Title VII suit, Pope, on 25 February 2003, moved to intervene in the Frazer litigation; Pope asserted, among other things, that the No-bypass Rule was unconstitutional and must be modified or ended.

That the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene is undisputed. Those efforts included preparation of a detailed (and costly) statistical analysis of the racial composition and recent racial hiring patterns in the Alabama public workforce. On 11 February 2003, the State defendants began discussions with the United States about the results of the statistical analysis and proposed to file a joint motion to terminate the No-bypass Rule on the grounds that the problems addressed in the Frazer litigation had been remedied. Because discussions were in process, the State defendants and the United States sought addi-

tional time to respond to Pope's intervention motion. On 20 May 2003, the State defendants and the United States filed a joint motion to terminate the No-bypass Rule; on that same date, they each filed answers opposing Pope's motion to intervene on the ground that Pope's interests were adequately represented by the existing parties. On 22 May 2003, a motion to intervene to support the continued efficacy of the No-bypass Rule was filed on behalf of African-American employees and applicants. On 20 January 2004, the district court granted both intervention motions under the permissive intervention provisions of Fed. R. Civ. P. 24(b).

On 20 May 2005, the district court granted a motion filed by Pope and supported by the State defendants and the United States to enjoin preliminarily the operation of the No-bypass Rule. At that time, the district court only suspended the Rule so that the African-American intervenors would have the opportunity to refute the district court's initial assessment that the No-bypass Rule no longer passed constitutional muster. On 30 June 2006, the district court permanently terminated the Rule. Pope sought attorney's fees and expenses totaling $105,317.82; the district court awarded $61,499.70.

The State defendants argue that the district court erred as a matter of law in concluding that Pope was a prevailing party vis-à-vis the State defendants;[1] according to the State defendants the interests of the State and Pope were aligned: both parties were successful in their efforts to terminate the No-bypass Rule. And the State defendants maintain that even if Pope could be consid-

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[1] In civil rights litigation, the district court may award the prevailing party, other than the United States, reasonable attorney's fees. 42 U.S.C. § 1988(b).

ered a prevailing party for fee award purposes, special circumstances make such an award manifestly unjust.

We review a district court's award of attorney's fees and costs for abuse of discretion, with underlying questions of law reviewed de novo and factual findings reviewed for clear error. *See Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach*, 353 F.3d 901, 904 (11th Cir. 2003). The State defendants argue that as a matter of law no attorney's fees may be awarded; they offer no challenge to the district court's attorney's fee calculation.

A party in civil rights litigation is a prevailing party for fee-shifting purposes if success has been attained on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quotation and citation omitted). Key to the determination of prevailing-party status is whether the party achieved "a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). When Pope moved to intervene in the Frazer litigation, the No-bypass Rule was being applied to promotion decisions made by the State defendants and thus to Pope as an employee of the Department of Corrections. As a consequence of litigation acts taken by Pope and the State defendants, the No-bypass Rule has been terminated judicially. There can be no doubt that there has been a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 1840, 149 L.Ed.2d 855 (2001). Pope was a prevailing party.

The State defendants seek to engraft a requirement that the defendant must assume an adversarial posture as a precondition to finding prevailing-party status. But we see nothing in the language of section 1988 that, as a matter of law, conditions the district court's power to award fees on the defendant's assuming an opposing posture.[2] The district court found and concluded expressly that Pope made a separate contribution to the litigation, that Pope's belief that his presence in the litigation was necessary was a reasonable belief, and that Pope's contribution was a substantial force in the court's decision to suspend the No-bypass Rule.[3] Because Pope's efforts contributed to a change in the State defendants' personnel practices, we see no error in the district court's determination that Pope was a prevailing party—and a prevailing party vis-à-vis the State defendants—for purposes of a fee award.

The State defendants argue that, even if Pope properly is considered a prevailing party, special circumstances render a fee award unjust. The State defendants argue correctly that a court may deny an award of attorney's fees to an otherwise prevailing party when special

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[2] The State defendants cite *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), for the position that fee applications are to be denied in civil rights litigation when the interests of the party seeking fees are aligned with the party against whom the fees are to be assessed. In *Reeves*, the defendants remained neutral on issues raised by plaintiffs in plaintiffs' efforts to defend a consent decree against third party attack. The attorney's fee applicant in *Reeves* sought no—and achieved no—change in the legal landscape.

[3] From the outset, Pope argued the unconstitutionality of the No-bypass Rule whereas the State defendants focused on statistical evidence to terminate the Rule. Pope's argument was of substantial import in suspending the Rule; Pope's argument was of more limited import in the final decision to terminate the Rule.

circumstances would render an award unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1937, 76 L.Ed.2d 40 (1983); *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985), *abrogated on other grounds by Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 1489, 103 L.Ed.2d 866 (1989) ("it is accepted jurisprudence that federal statutes which permit an award of attorney's fees to prevailing parties in selected litigation are subject to a special circumstances provision"). The defendant bears the burden of establishing that special circumstances render a fee award unjust, *Martin*, 773 F.2d at 1150; and this judicially created exception to the statutory fee provision is to be narrowly construed. *Id.*

We see no abuse of discretion in the award of fees under the circumstances of this case. The special circumstances cited by the State defendants—that the State defendants' efforts to terminate the No-bypass Rule predated Pope's intervention, that the parties' interests were aligned, that Pope's contribution was largely redundant, that the State incurred considerable expense in compiling the statistical data upon which the district court relied in the final termination decision, that the State defendants were under legal compulsion to apply the No-bypass Rule until the district court ruled otherwise, and that Pope's intervention was "claim jumping"—are either contrary to the district court's findings, or are already accounted for by the district court's deductions from the fee request, or otherwise fail to persuade us that the district court abused its discretion when it failed to apply the narrow special circumstances exception to the fee award statute.

AFFIRMED.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-MHT.

Sept. 17, 2007.

OPINION AND ORDER

MYRON H. THOMPSON, United States District Judge.

Previously, the court terminated the judicially imposed no-bypass rule, which, in general, had since 1970 prohibited Alabama state officials from by-passing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. *United States v. Flowers (Flowers II)*, 444 F.Supp.2d 1192 (M.D. Ala. 2006) (Thompson, J.); *United States v. Flowers (Flowers I)*, 372 F.Supp.2d 1319 (M.D. Ala. 2005) (Thompson, J.). This long-standing litigation, brought by plaintiff United States of America and naming several officials of the State of Alabama as defendants, is again before the court, this time on motions for attorneys' fees and expenses, filed by plaintiff-intervenor Timothy D. Pope, a white employee of the Alabama Department of Corrections who had claimed that he had

been denied a promotion because of the no-bypass rule. For the reasons given below, of Pope's requested $105,317.82 for fees and expenses from the state defendants, the court will award $61,499.70.

I. BACKGROUND

The relevant facts, chronologically, are as follows:

May 2002: In order to determine whether the no-bypass rule was still necessary, the state defendants hired statistical experts to examine the racial composition of the Alabama workforce as well as the racial patterns of recent selections in the workforce.

February 11, 2003: The state defendants initiated discussions with the United States about the results of the report of the experts.

February 25, 2003: Pope filed a motion to intervene.

March 20 and 27, 2003: The United States filed a motion to hold Pope's intervention motion in abeyance for 45 days, and the motion was granted.

March 20, 2003: The United States and the state defendants filed a joint motion to terminate the no-bypass rule.

May 22, 2003: Representatives of African-American employees of the State of Alabama moved to intervene.

January 20, 2004: Pope and the African-American representatives were all allowed to intervene.

February 28, 2004: Pope filed a complaint-in-intervention and a motion seeking, essentially, to terminate the no-bypass rule.

March 12, 2004: The African-American representatives filed a complaint-in-intervention.

April 29, 2005: The court entered an order requiring that the parties show cause as to why the motions to terminate the no-bypass rule, filed by the United States, the state defendants, and Pope should not be treated as requests for preliminary relief and why the no-bypass rule should not be preliminary enjoined, that is, suspended. *Flowers I*, 372 F.Supp.2d at 1322-25.

May 9, 2005: Pope filed a motion for preliminary injunctive relief.

May 20, 2005: The court treated the United States and the defendants' joint motion to terminate as a motion for preliminary relief; granted that preliminary-relief motion as well as Pope's preliminary-relief motion; and suspended the no-bypass rule pending final resolution of the challenges to the rule. *Id.* at 1325-26.

June 1, 2005: Pope filed a motion for award of attorneys' fees as follows:

ATTORNEYS	RATE	HOURS	AMOUNT
Raymond Fitzpatrick, Jr.	$300	62.25	$18,675.00
J. Michael Cooper	225	12.00	2,700.00
R. Scott Clark	225	141.25	31,781.25
Gary L. Brown	175	150.50	26,337.50
SUBTOTAL			$79,493.75
Expenses			$4,899.90
TOTAL			$84,393.65

September 9, 2005: Pope and the state defendants filed motions for summary judgment.

June 30, 2006: After substantial discovery, the court entered an opinion and judgment granting the summary-judgment motions, granting the motions to terminate the no-bypass rule, and permanently terminating the rule. *Flowers II*, 444 F.Supp.2d at 1193-94.

July 12, 2006: Pope filed a supplemental motion for award of attorneys' fees as follows:

ATTORNEYS	RATE	HOURS	AMOUNT
Raymond Fitzpatrick, Jr.	$300	23.25	$6,975.00
J. Michael Cooper	225	9.75	2,193.75
R. Scott Clark	225	7.50	1,687.50
Gary L. Brown	175	57.00	9,975.00
SUBTOTAL			$20,831.25[1]
Expenses			$92.92
TOTAL			$20,924.17

Pope is therefore seeking $79,493.75 in fees and $4,889.90 in expenses in his first motion and $20,831.25 in

[1] In his brief, Pope shows a total fee of $20,706.25, but, when the court multiplies the number of hours listed times the rates requested, it gets a total fee of $20,831.25, a difference of $125.00.

fees and $[illegible].92 in expenses in his second motion, for a total sum of $105,317.82.

II. LEGAL STANDARD FOR ATTORNEY'S FEES

In federal civil-rights litigation, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001) (statutory fee-shifting provisions from different statutes have been interpreted consistently). "Determining a plaintiff's entitlement to attorney fees entails a three-step process. First, a court asks if the plaintiff has 'prevailed' in the statutory sense. Second, the court calculates the 'lodestar,' which is the number of hours (tempered by billing judgment) spent in the legal work on the case, multiplied by a reasonable market rate in the local area. Finally, the court has the opportunity to adjust the lodestar to account for other considerations that have not yet figured in the computation, the most important being the relation of the results obtained to the work done." *Dillard v. City of Greensboro*, 213 F.3d 1347, 1353 (11th Cir. 2000) (citations omitted).

The fee applicant bears the burden of "establishing entitlement and documenting the appropriate hours and hourly rates." *Norman v. Hous. Auth. of Montgomery*, 836 F.2d 1292, 1303 (11th Cir. 1988). This burden includes supplying the court with specific and detailed evidence from which it can determine the reasonable hourly rate, maintaining records to show the time spent on the different claims, and setting out with sufficient particularity the general subject matter of the time expendi-

tures so that the district court can assess the time claimed for each activity. *ACLU v. Barnes*, 168 F.3d 423, 427 (11th Cir. 1999).

A fee applicant should also exercise "'billing judgment,'" *id.* at 428 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983)). That is, the applicant should "exclude from his fee applications 'excessive, redundant, or otherwise unnecessary [hours],' which are hours 'that would be unreasonable to bill to a client and therefore to one's adversary irrespective of the skill, reputation, or experience of counsel.'" *Id.* (quoting *Norman*, 836 F.2d at 1301) (citation omitted).

"Those opposing fee applications have obligations, too. In order for [district] courts to carry out their duties in this area, 'objections and proof from fee opponents' concerning hours that should be excluded must be specific and 'reasonably precise.'" *Id.* (quoting *Norman*, 836 F.2d at 1301).

In making the above determinations, the court is guided by the twelve factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)[2], and approved in *Blanchard v. Bergeron*, 489 U.S. 87, 91-92, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989). These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the

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[2] In *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

III. APPLICATION OF LEGAL STANDARD

The state defendants argue that "Pope is not a 'prevailing party' *vis-a-vis* [them] because the State [did not] oppose[] Pope's motion to terminate the no-bypass rule." Defendants' memorandum of law (doc. no. 782) at 2. The state defendants explain that they "commenced their work to vacate the no-bypass rule almost a year before Pope sought to intervene in this action," *id.*, and that they, "joined by the United States, aggressively litigated their motion to a successful conclusion." *Id.*

In *Buckhannon Bd. & Care Home, Inc., v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001), the United States Supreme Court held that a party is a "prevailing party" for fee-shifting purposes if he has achieved a sought-after "judicially sanctioned change in the legal relationship of the parties." 532 U.S. at 600. Here, this court did not grant the United States and the state defendants' joint motion to terminate the no-bypass rule and then deny Pope's termination motion as moot; instead, the court granted both motions. While Pope may not have achieved the sought-after change by himself, he still achieved it. Pope is a prevailing party. This conclusion does not mean, however, as explained below, that he is entitled to all his requested fees.

The first component of the lodestar figure is the number of hours reasonably expended. To determine this number the court relies primarily on the first *Johnson* factor, the amount of time and labor required. The state defendants maintain that most, if not all, of Pope's fees should be denied because his work was unnecessary to the litigation. The court agrees with the state defendants that to the extent that Pope's participation in this lawsuit was unnecessary or redundant, his time and hours should be reduced. *Cf. Ass'n of Disabled Americans v. Neptune Designs, Inc.*, 469 F.3d 1357, 1360 (11th Cir. 2006) ("Where the factual record supports a finding that the plaintiff filed or maintained a suit unnecessarily, a district court may properly consider such a finding in setting the amount of attorneys fees."). Therefore, the critical issue for the court is whether Pope's time and labor were redundant of that expended by the United States and the state defendants, or, to put the issue differently, whether Pope made a separate contribution to the litigation, and, if so, what it was.

First, the state defendants observe that they began their efforts to terminate the no-bypass rule in May 2002. However, it must remembered that, when Pope filed his motion to intervene in February 2003, the rule still applied to him, and, indeed, according to him, he had been, and continued to be, denied promotions because of the rule. He therefore had a *live* and *real* dispute with the State at that time. He should not have been expected to wait on the sidelines to see if the state defendants would follow through with their efforts to terminate the rule; moreover, Pope could not be certain that the state defendants would not agree to modify, rather than terminate the rule, in the wake of a significant challenge—a challenge which, in fact, came to bear when the

African-American representatives intervened. Hindsight might suggest that at some point in the future the outcome of this litigation would have been the same without Pope's presence in this litigation; but foresight, at the time Pope sought to intervene, provided no such certainty. Pope's belief that his presence in this litigation was necessary was reasonable.

Next, the state defendants argue that Pope made the same arguments that they did in support of terminating the no-bypass rule; sought the same relief that they did; and relied on their workforce composition evidence. This argument, essentially, puts at issue whether Pope made any separate contribution to the litigation other than his presence. The court, after revisiting the record in this case, believes that Pope did, albeit to only a limited extent.

In orders entered on April 29 and May 20, 2005, this court stated that, because the no-bypass rule, which had been in effect for approximately 35 years, "is a race-conscious provision and, as such, must meet 'strict scrutiny' standards and must be 'narrowly tailored,' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995)," *Flowers I*, 372 F.Supp.2d at 1323, and, because, "if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting," *id.*, the rule "cannot continue without a court finding that it continues to meet the demanding requirements for race-conscious relief." *Id.* With regard to the evidence submitted by the United States and the state defendants, the court stated the "the important question is whether the picture of race-relations in the government of the State of Alabama has reached the critical point where claims of race discrimination can be adequately addressed through traditional

federal remedies, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981; the current record strongly suggests that that picture, albeit perhaps a very imperfect one, has reached that point." *Flowers I*, 372 F.Supp.2d at 1324.

So as to give the African-American representatives an opportunity to cure the defect, that is, that the rule had not been reviewed and re-authorized by a court during it extended existence, and so as to give them an opportunity to refute the evidence submitted by the United States and the state defendants, the court entered a preliminary injunction that only suspended the rule. *Id.* at 1325.

On June 30, 2006, relying principally on evidence submitted by the African-American representatives, the United States, and the state defendants, the court entered a final opinion and judgment that concluded that the no-bypass rule, "while narrowly tailored when imposed to redress the State's across-the-board discrimination at that time, is no longer narrowly tailored to redress the specific types of alleged racially discriminatory practices identified by the African-American intervenors today." *Flowers II*, 444 F.Supp.2d at 1194. "Those alleged practices may still need fixing," the court continued, "but the no-bypass rule is no longer one of the appropriate tools; there is no longer a fit between the alleged practices and the rule." *Id.* The court found, among other things, that "the percentage of African-Americans in 2003 in the state workforce rose to 39; while, at the same time, between 1983 and 2003, the percentage of African-Americans in the lowest pay-grade groups decreased from 48 (as opposed to 23 for whites)

to 11 (as opposed to 8 for whites), and, in general, there was a substantial redistribution of African-Americans into jobs categories with higher, and even the highest, earning potential. Thus, all experts agree "that the percentage of African American employees in the State of Alabama workforce has increased from 1970 to 2003 and that the distribution of these employees has changed from lower skilled positions to higher skilled positions, and consequently, higher paying, ... categories." *Id.* at 1193-94 (footnote omitted). The court therefore permanently terminated the rule. *Id.* at 1194.

Pope's forceful position in this case, that the no-bypass rule was unconstitutional on its face and should be terminated immediately without consideration of any evidence from any of the other parties, played a substantial role in convincing the court that the rule should be suspended early, that is, pending final resolution of the challenges to it. Pope can therefore take substantial, but not total, credit toward the early suspension of the rule. However the court's final termination of the rule, after all evidence had been completed, was driven more by the arguments and evidence of the United States and the state defendants. Pope's contribution to the litigation at this stage was significantly less.

As to Pope's first, June 2005, fee petition, therefore, the court believes that, with exceptions to be discussed in the next paragraph, the hours and labor expended by Pope during the period leading up to the no-bypass rule's suspension are reasonable and should be recovered to the extent of 70%. The remaining 30% was redundant of the work done by the United States and the state defendants.

Two of the exceptions to the amount requested for

the first fee petition are for work done by Pope on (1) the unsuccessful motion by others to intervene and (2) his unsuccessful motion for class certification. This work was unnecessary, and the fee on his first petition should be reduced by $9,037.50, which reflects the hours spent on these items. A third exception is the $12,850.00 fee for the amount of time litigating fees for the first petition. While fees for litigating fees are recoverable, *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 799 (11th Cir. 2003), this amount is excessive when considered in light of Pope's contribution to the merits of this litigation and when considered for reasonable in general; it will be reduced by $5,000.00.

The court therefore calculates the lodestar for the first fee petition as follows:

Requested amount for non-fee work ($79,493.75-12,850.00)	$66,643.75
Less time for work done on unsuccessful intervention and class certification	9,037.50
SUBTOTAL	$57,606.25
Less 30% for redundant work ($57,606.25 x .30)	17,281.87
SUBTOTAL	$40,324.38
Plus the reduced amount for litigating fees ($12,850-5,000.00)	7,850.00
TOTAL	$48,174.38

As to the second, July 2006, fee petition, as the court has stated, Pope's contribution to the litigation at this

stage was significantly more limited. In addition, his fees for litigating fees approaches 50% of the fee petition and is excessive when considered in light of Pope's overall contribution to the merits of this litigation and when considered for reasonableness in light of the total fees for litigating fees in the wake of the state defendants' challenge to the fees. The court will therefore allow him to recover only 40% of the total amount requested, that is, $8,332.50 ($20,831.25 x .40). He may recover 10%, that is, $2,083.13 ($20,831.25 x .10), for fees on the merits; he may recover 30%, that is, 6,249.37, ($20,831.25 x .30), for fees for fees.

The *Johnson* factors as well as the other considerations listed above as part of the legal standard for determining a reasonable fee, to the extent they have not been subsumed in the discussion above, do not warrant an adjustment of the fee petitions. The expenses requested in both fee petitions are reasonable and fully recoverable.

The total amount recoverable in this case is therefore calculated as follows:

First fee petition		
Time and labor	$48,174.38	
Expenses	4,899.90	
SUBTOTAL	$53,074.28	$53,074.28
Second fee petition		
Time and labor	$8,332.50	
Expenses	92.92	
SUBTOTAL	$8,425.42	$8,425.42
TOTAL		$61,499.70

Also, the court, looking at the big picture rather than just its parts, concludes that this total fee of $61,499.70 is reasonable and should be awarded to Pope from the state defendants.

* * *

Accordingly, for the above reasons, it is ORDERED that plaintiff-intervenor Timothy D. Pope's motions for award of attorneys fees and expenses (Doc. Nos. 740 & 781) are granted to the extent that plaintiff-intervenor Pope shall have and recover from defendants Tommy G. Flowers, et al., the total sum of $61,499.70 for fees and expenses.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-MHT.

June 30, 2006.

OPINION

MYRON H. THOMPSON, District Judge.

The issue before the court is whether, after approximately a third of a century, the court-imposed no-bypass rule should be terminated. In general, the rule prohibits Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. Because there are no disputed issues of material fact, *see* Fed. R. Civ. P. 56, and for the reasons given below, the court concludes that a summary judgment terminating the rule should be entered.

On May 20, 2003, plaintiff United States of America was joined by the defendants, who are officials of the State of Alabama, in filing a motion to terminate the no-bypass rule. This court granted permissive intervention

to representatives of two groups of African-American employees of the State of Alabama, and to Timothy Pope, a white employee of the Alabama Department of Corrections who says he was denied a promotion because of the no-bypass rule. On January 28, 2004, Pope joined the United States and the state defendants in their termination motion. Previously, on May 20, 2005, the court suspended, as opposed to terminating, the rule so as to allow the African-Americans intervenors to complete discovery on the issue. *United States v. Flowers*, 372 F.Supp.2d 1319 (M.D. Ala. 2005) (Thompson, J.).

Now that all relevant evidence has been presented, the court finds that the requirements of Rule 60(b) of the Federal Rules of Civil Procedure and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L.Ed.2d 867 (1992), have been met, that is, there has been a "significant change in [factual] circumstances" and termination of the no-bypass rule is "suitably tailored" to these changed circumstances. *Id.* at 383, 112 S. Ct. 748. As this court has stated, the no-bypass rule was "imposed in response to evidence that, up until 1970, the State of Alabama was unabashedly refusing to hire and promote African-Americans to almost any and all nonmenial positions in state government because of their race." *Flowers*, 372 F.Supp.2d at 1323. The rule was part of an extensive remedial order to redress this discrimination.

In contrast, the current record reflects "that the racial make-up of Alabama's government is dramatically different from what it was in 1970, when the no-bypass rule was imposed." *Id.* at 1324. More specifically, and for example, the percentage of African-Americans in 2003 in the state workforce rose to 39; while, at the same time, between 1983 and 2003, the percentage of African-

Americans in the lowest pay-grade groups decreased from 48 (as opposed to 23 for whites) to 11 (as opposed to 8 for whites), and, in general, there was a substantial redistribution of African-Americans into job categories with higher, and even the highest, earning potential. Thus, all experts agree "that the percentage of African American employees in the State of Alabama workforce has increased from 1970 to 2003 and that the distribution of these employees has changed from lower skilled positions to higher skilled positions, and consequently, higher paying, ... categories."[1]

To be sure, as the African-American intervenors observe, the evidence also reflects that African-Americans have still not achieved parity with whites in the overall state workforce and in certain parts of that workforce. However, the intent of the no-bypass rule was not to achieve racial parity, *see Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) ("The Constitution does not guarantee racial parity in public employment"); rather, it was to help in redressing the State's across-the-board discrimination in employment, including specifically the State's intentional bypassing of higher-ranked African-American applicants in favor of a lower-ranked white applicants so as to limit African-Americans to menial jobs. The intent was to knock down the State's wall of racial discrimination.

The African-American intervenors also note that their statistical evidence suggests that there may still be discriminatory practices in other aspects of the State's selection process and even in some state agencies; this evidence further suggests significant pay disparities be-

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[1] African-American intervenors' brief (Doc. No. 737), at 13 (citations and quotation marks omitted).

tween African-Americans and whites within some job categories. "[T]he no-bypass rule is a race-conscious provision and, as such, must meet 'strict scrutiny' standards and must be 'narrowly tailored,' *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995)." *Flowers*, 372 F.Supp.2d at 1323. The across-the-board rule, while narrowly tailored when imposed to redress the State's across-the-board discrimination at that time, is no longer narrowly tailored to redress the specific types of alleged racially discriminatory practices identified by the African-American intervenors today. Those alleged practices may still need fixing, but the no-bypass rule is no longer one of the appropriate tools; there is no longer a fit between the alleged practices and the rule.[2]

An appropriate judgment will be entered.

DONE, this the 30th day of June, 2006.

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) Intervenor Timothy D. Pope's motion for summary judgment (doc. no. 757) and the State defendants

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[2] Indeed, it is arguable that the African-American intervenors may have overstated their case. Their evidence suggests that some of the alleged practices and disparities they identify have remained and continued unallayed by the no-bypass rule, thereby suggesting the rule has been ineffective as to these practices and disparities. Therefore, to the extent these alleged practices and disparities need a remedy, they need a new one more tailored to them than the no-bypass rule.

motion for summary judgment (doc. no. 759) are granted.

(2) Plaintiff United States of America and the State defendants' joint motion to terminate no-bypass provisions of injunctive orders (doc. no. 634) and intervenor Pope's motion to modify injunction (doc. no. 659) are granted.

(3) The application of the no-bypass rule in this litigation is permanently terminated.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE, this the 30th day of June, 2006.

United States District Court, M.D. Alabama, Northern Division.

UNITED STATES of America, Plaintiff,
Timothy D. Pope, Plaintiff-Intervenor,
Johnny Reynolds, et al., Plaintiff-Intervenors,
Eugene Crum, Jr., et al., Plaintiff-Intervenors,
v.
Tommy G. FLOWERS, et al., Defendants.
Alabama State Conference of NAACP Branches, Amicus Curiae.

Civil Action No. 2:68cv2709-T.

May 20, 2005.

ORDER

MYRON H. THOMPSON, District Judge.

This litigation, *United States v. Flowers*, civil action no. 2:68cv2709-T (previously styled *United States v. Frazer*, and still frequently known today as "*Frazer*" or the "*Frazer* litigation"), is before the court on the difficult issue of what discovery, if any, the court should allow before it decides whether *Frazer's* 35-year-old "no-bypass rule" should be terminated.

I.

Paragraph 3 of § II of the 1970 injunction in *Frazer* provides as follows:

> "Defendants shall not appoint or offer a position to a lower-ranking white

> applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is unavailable. In every instance where a determination is made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding."

United States v. Frazer, 317 F. Supp. 1079, 1091 (M.D. Ala. 1970). This provision, which embodies what is now called the no-bypass rule, prohibits Alabama state officials from bypassing a higher-ranked African-American applicant in favor of a lower-ranked white applicant on a certificate of eligibles. The rule was imposed in response to evidence that, up until 1970, the State of Alabama was unabashedly refusing to hire and promote African-Americans to almost any and all non-menial positions in state government because of their race.

On May 20, 2003, plaintiff United States of America was joined by the defendants, who are officials of the State of Alabama, in filing a motion to terminate the no-bypass rule. This court granted permissive intervention to representatives of African-American employees of the State of the State of Alabama, and to Timothy Pope, a white employee of the Alabama Department of Corrections who says he was denied a promotion because of the no-bypass rule. On January 28, 2004, Pope joined the United States and the state defendants in their termina-

tion motion.

This court instructed the parties to agree on a discovery plan, but they could not do so. The United States, the state defendants, and Pope argued that discovery should be limited to an analysis of the data underlying the statistical report that the original parties had submitted, which purports to show that the no-bypass rule is no longer necessary. The African-American intervenors wanted discovery to be much broader, encompassing information about specific instances of alleged discrimination across the State government; they argued that the question of whether the no-bypass rule was still necessary could require an agency-by-agency or classification-by-classification analysis.

This court initially approved the more limited proposed discovery plan of the United States, the defendants, and Pope. However, the court left open the possibility that it would allow more discovery after reviewing the African-American intervenors' rebuttal report.

II.

The discovery dispute presented to the court is difficult because the court is confronted with two serious and competing concerns. On the one hand, the court is very reluctant to foreclose further discovery by the African-American intervenors, for the court would be essentially ruling on the merits of the issue presented without having given all interested parties an opportunity to develop their case. Further discovery and court action is warranted on, at least, the important issues presented pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

On the other hand, the court is confronted with the following reality: First, the no-bypass rule is a race-conscious provision and, as such, must meet "strict scrutiny" standards and must be "narrowly tailored," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L.Ed.2d 158 (1995); if logic and common sense are to apply, the no-bypass rule cannot be both narrowly tailored and everlasting. Second, the rule has been in effect for approximately 35 years without an independent court review to determine if it continues to meet legal requirements. Because the rule cannot be everlasting, this circumstance is impermissible; in other words, the rule simply cannot continue without a court finding that it continues to meet the demanding requirements for race-conscious relief. Third and finally, the evidentiary record submitted by United States and state defendants shows a strong likelihood that, when all is said and done, the rule cannot continue. Although the court recognizes that the African-American intervenors maintain that Alabama has not progressed enough to warrant the rule's termination, it cannot be discounted that the racial make-up of Alabama's government is dramatically different from what it was in 1970, when the no-bypass rule was imposed.

In resolving these competing concerns, the court concludes that it should be guided by the standards developed for issuing a preliminary injunction. Generally, a preliminary injunction should be entered if the movant clearly establishes that (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will be suffered unless the injunction issues, (3) threatened injury to the movant outweighs whatever damage proposed injunction may cause the opposing party, and (4) the injunction, if issued, would not be adverse to the pub-

lic interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1307 (11th Cir. 1998). "Ordinarily the first factor is most important." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). This court believes that, with these standards tailored to the circumstances of this case, the United States, the state defendants, and Pope have met them.

As indicated above, there is not only a likelihood, but a strong likelihood, that the United States, the state defendants, and Pope will prevail on the merits of their motions. In light of the substantial positive change in the racial makeup of the government of the State of Alabama after the uninterrupted implementation of the no-bypass rule for 35 years, the court believes that the record strongly suggests that, on balance, the African-American intervenors will not suffer substantial harm from the mere temporary cessation of the no-bypass rule pending the resolution of the pending substantive motions. And in light of the Supreme Court's strong mandate that all race-conscious relief must be narrowly tailored, the court further believes that the record strongly suggests that the continued implementation of the no-bypass rule would cause irreparable injury to all state employees and applicants for state jobs, and thus would be against the public interest, in the absence of an independent and compelling finding by the court that such race-conscious relief is still warranted after having been implemented for over a third of a century.

The court, however, recognizes that the African-American intervenors believe that the State has not progressed enough and, in fact, there may be evidence that some state officials have intentionally used devices (such a manipulation of registers and giving everyone the same score) so as to circumvent the no-bypass rule. But the

important question is whether the picture of race-relations in the government of the State of Alabama has reached the critical point where claims of race discrimination can be adequately addressed through traditional federal remedies, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981; the current record strongly suggests that that picture, albeit perhaps a very imperfect one, has reached that point.

This court therefore tentatively concludes that it should *preliminarily* and *immediately* discontinue the no-bypass rule. However, because the court's approach in this case has not been informed by the parties (in particular, the African-American intervenors), the court will not make a final decision on whether the no-bypass rule should be suspended without hearing first from all concerned.

Accordingly, it is ORDERED that all parties show cause, if any there be, in writing by no later than May 9, 2005, as to the following:

(1) Why plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule (Doc. No. 634) and plaintiff-intervenor Timothy Pope's motion to modify injunction as to the no-bypass rule (Doc. No. 659) should not be treated as also requests for preliminary relief; and

(2) Why said requests for preliminary relief should not be granted as outlined in this order.

It is further ORDERED that, by no later than May 20, 2005, the court will resolve whether preliminary relief should be granted.

In a companion order entered today the court addresses what discovery is allowed on plaintiff United States of America and the state defendants' joint motion to terminate the no-bypass rule (Doc. No. 634) and on plaintiff-intervenor Pope's motion to modify injunction as to the no-bypass rule (Doc. No. 659).

DONE, this the 29th day of April, 2005.

ORDER

This litigation is again before the court, this time on whether the court should implement the preliminary relief suggested in its show-cause order of April 29, 2005.[1] The defendants agree to the relief; intervenor Timothy Pope not only agrees to the relief, he has also filed a motion expressly asking for such relief; plaintiff United States of America opposes the interim relief and instead requests that the no-bypass rule be terminated immediately and permanently without allowing for any additional discovery and without resolving any of the currently pending discovery disputes; and the African-American intervenors oppose any relief, preliminary or permanent.

For the reasons stated in the court's April 29 order and based on Pope's motion, the court will grant the suggested preliminary relief. The court, however, makes these additional findings. First, for the reasons set forth in the court's April 29 order and pursuant to Fed.R.Civ.P. 60(b), the defendants and Pope have established "that a significant change in circumstances war-

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[1] Two orders were entered on April 29. One contained suggested preliminary relief (Doc. No. 723), and the other set forth a framework for discovery (Doc. No. 724).

rants" a suspension of the no-bypass rule. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 383, 112 S. Ct. 748, 760, 116 L.Ed.2d 867 (1992). More specifically, there has been "a significant change ... in factual conditions [and] in law," *id.* at 383, 112 S. Ct. at 760; and the "proposed [preliminary] modification is suitably tailored to the changed circumstance." *Id.*

Second, the court rejects the African-American intervenors' contention that it has not made specific findings of fact and reached specific conclusions of law to support the interim relief. This order and the April 29 order provide such.

Third, the African-American intervenors have had sufficient time and opportunity to develop the record upon which the court relies. Indeed, to adopt the African-American intervenors' view, the court would essentially have to wait until all evidence has been developed, thereby defeating the necessary interim relief. As the court stated in its April 29 order, the continued implementation of the race-conscience, indeterminate, across-the-board no-bypass rule without any recent court review and re-authorization during its extended existence, is, on its face, unconstitutional.[2] By providing for only interim, rather than permanent, relief at this time, the court gives the African-American intervenors an opportunity to cure this defect, if they can; in the meantime, however, the rule simply cannot remain in effect.

---

[2] In its April 29 order, the court said the continued need for the no-bypass rule had not been reviewed since 1970. The court was incorrect. In 1976, the no-bypass rule was extended to include other state departments and officials not included in the 1970 injunction. *United States v. Frazer*, 1976 WL 729 (M.D. Ala. Aug. 20, 1976). However, the conclusions reached by the court in its April 29 order remain unchanged.

Finally, the defendants take issue with a separate, discovery order entered on April 29 directing the magistrate judge "to see if a plan can be developed for more extensive, but still quite limited, discovery."[3] They argue that "the companion discovery order will almost certainly foment future discovery disputes that could quickly overwhelm the parties and the Court."[4] The court has not unconditionally directed the magistrate judge to develop a plan for more discovery. Rather, the magistrate judge is to work with the parties to see "if" a plan can be developed. In addressing this "if," the magistrate judge should consider not only whether any additional discovery is relevant but, if so, the defendants' articulated concern as well.

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The joint motion to terminate the no-bypass rule (Doc. No. 634) is treated as a motion for preliminary relief filed by defendants and said motion is granted.

(2) Plaintiff intervenor Timothy Pope's motion for preliminary relief (Doc. No. 732) is granted.

(3) Pending final resolution of the joint motion to terminate the no-bypass rule (Doc. No. 634) and the motion to modify injunction as to the no-bypass rule (Doc. No. 659), the application of the no-bypass rule is suspended, effective no later than June 20, 2005. The court assumes that the defendants need a reasonable period of time to put this suspension into effect in an orderly and fair manner.

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[3] Order entered April 29, 2005 (Doc. No. 724), at 3. *See also supra* note 1.

[4] Defendants' response (Doc. No. 725), at 3.

DONE, this the 20th day of May, 2005.

42 U.S.C. § 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * *

42 U.S.C. § 2000e-5. Enforcement provisions

* * *

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

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(4)

Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

No. 08-345

IN THE

Supreme Court of the United States

ALABAMA, *et al.*,

Petitioners,

v.

TIMOTHY D. POPE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
GARY L. BROWN
FITZPATRICK & BROWN, LLP
1929 Third Avenue North
Suite 600
Birmingham, Alabama 35203
(205) 320-2255

Attorneys for Respondent

QUESTION PRESENTED

Whether the prevailing party test for assessing liability for civil rights attorney's fees under 42 U.S.C. § 1988 should be modified to exempt a defendant from fee liability when it belatedly agrees with the plaintiff's position on the merits of the claim yet does not change its conduct until after the court grants relief? Not one circuit court has agreed with the position advocated by the Petitioners.

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Rule 54(d)(2), F.R.Civ.P. 7

STATEMENT OF THE CASE

Petitioners State of Alabama, et al. ("State" or "Alabama") seek review of the long-standing precedent of this Court creating the "prevailing party" test for awards of attorney's fees under 42 U.S.C. § 1988. Alabama contends that because it eventually confessed the unconstitutionality of its raced-based employment policy, respondent Timothy D. Pope ("Pope") was aligned with Alabama and as a matter of law cannot be a prevailing party for purposes of awarding attorney's fees under § 1988, despite the fact that Pope obtained an order changing the legal relationship between the parties. Pope believes this case does not present an appropriate vehicle for revision of the prevailing party standard.

The Eleventh Circuit's seven page unpublished decision affirmed the district court's order awarding attorney's fees to Pope under the abuse of discretion standard. App. 6a. Contrary to the claims of the artfully-crafted petition, this case does not present an issue on which the circuits are split. The Eleventh Circuit's decision follows the long-standing rule that a civil rights plaintiff that obtains a court order that changes the conduct of a defendant employer is considered a prevailing party entitled to fees under § 1988. In this case, Pope was unlawfully denied a promotion by the State and successfully obtained an order from the district court requiring Alabama to stop applying a racial preference for African-American job applicants which had been adversely applied to Pope. Pope had to pursue litigation for over two years in order to obtain that result and change the conduct of the defendant.

A. Proceedings in the District Court.

This case was filed in 1968 by the United States against various agencies of the State of Alabama to enforce the anti-discrimination provisions of federal funding statutes. App. 1a. The district court found Alabama liable and entered an injunction governing the defendants' employment practices on July 28, 1970. App. 2a; *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970). Alabama officials were enjoined from bypassing a higher-ranked black applicant in favor of a lower-ranked white applicant:

> 2. Negro applicants shall be appointed to positions other than custodial, domestic, laborer or laboratory aide, when said Negro applicants are listed on a Certification of Eligibles, unless higher-ranking white applicants on the certificate are appointed to fill the vacancy (or all the vacancies) in the listed position, or unless the defendants determine that the Negro applicant is not qualified to perform the duties of the position, or is otherwise not fit for the position.
>
> 3. Defendants shall not appoint or offer a position to a lower-ranking white applicant on a certificate in preference to a higher-ranking available Negro applicant, unless the defendants have first contacted and interviewed the higher-ranking Negro applicant and have determined that the Negro applicant cannot perform the functions of the position, is otherwise unfit for it, or is

> unavailable. In every instance where a determination is made that the Negro applicant is unfit or unavailable, documentary evidence shall be maintained by the defendants that will sustain that finding.

Frazer, 317 F. Supp. at 1091; doc. no. 65.[1] Several other State departments and officials were subsequently joined as defendants and the district court entered a further injunction on August 20, 1976. Doc. no. 142. This overtly race-based remedy order was commonly referred to as the *Frazer* No-bypass Rule. App. 2a. The district court conducted no further review of the injunctions until after Pope initiated these proceedings in 2003. App. 33a.

Pope is a white male employee of the Alabama Department of Corrections. He was offered and accepted a promotion in September 2002. Shortly thereafter, the promotion was rescinded as violative of the No-bypass Rule. App. 2a. Pope filed a pro se charge of race discrimination with the EEOC and received a right to sue letter on December 4, 2002. Pope also sought assistance from the Attorney General of Alabama. The State refused to take any action to seek relief from the rule or otherwise promote Pope. After obtaining counsel in January 2003, Pope filed his individual suit on February 21, 2003. The district court's dismissal of Pope's individual Title VII case is now pending before the Eleventh Circuit Court of Appeals. *Pope v. State of Alabama*, no. 08-14729 (11th Cir.).

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1. Record citations in this brief are to the appendix to the petition for writ of certiorari or to the document numbers assigned by the district court.

Because of the continuing impact of the *Frazer* No-bypass Rule on his promotional opportunities, on February 25, 2003 Pope also moved to intervene in *Frazer* and sought an order ending the racially discriminatory preference. Pope asserted that the 30-year old *Frazer* No-bypass Rule was facially unconstitutional under modern strict scrutiny standards and should be terminated. App. 2a.

Alabama's counsel asked the district court to delay action on Pope's motion to intervene while they discussed the matter with counsel for the United States. Doc. no. 608. Finally, on May 20, 2003, Alabama urged the court to deny Pope's intervention motion. Doc. no. 633. At the same time, the United States and Alabama filed a "Joint Motion To Terminate No-Bypass Provisions of Injunctive Orders." App. 2a, 3a; doc. no. 634. The United States and the State of Alabama defendants sought termination of the No-bypass Rule alleging that "the evidence that the discriminatory practices requiring the implementation of the no-bypass rule have ceased and the effects of such practices have been remedied." *See* doc. no. 634. In his response to the joint motion, Pope agreed that the No-bypass Rule should be terminated as he had urged several months earlier, but pointed out that the United States and the State defendants had not raised the constitutional issues raised by Pope in his complaint-in-intervention and motion to modify. Unlike the State of Alabama, Pope urged the district court to immediately suspend operation of the rule without further proceedings due to its facial unconstitutionality. Doc. no. 648. The State defendants subsequently filed an expert's statistical

report in support of the joint motion. *See* doc. nos. 634, 675.[2] While Pope was seeking an immediate end to the rule due it its facial unconstitutionality, Alabama made the fact-intensive claim that after thirty years its workforce was sufficiently diverse that the preference was no longer needed.

Alabama opposed Pope's effort to intervene and the rule remained in effect. There was no progress for eight months until the district court granted Pope's motion to intervene on January 20, 2004. App. 3a. Pope's complaint-in-intervention and motion to modify was then filed by the clerk on January 28, 2004. Doc. no. 659. The district court also granted intervention to a group of African-American state employees. The African-American intervenors urged the continuation of the race-based No-bypass Rule and filed their own expert report in response to the State's expert report. *See* App. 3a; doc. no. 698. The proceedings became mired in

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2. Alabama claims it retained experts and commenced its review in May 2002, before it rescinded Pope's promotion. Pet. at 3. While that assertion by its counsel is not supported by any evidence other than its counsel's affidavit, it only bolsters Pope's position that the State knew the rule was invalid when it rescinded Pope's promotion. Alabama continues to claim that it was pursuing vacation of the order before Pope moved to intervene. While the State represents that it was busy working to vacate the rule in May 2002, the face of the expert report shows it is based on year-end 2002 data and was not completed until April 2003, some two months *after* Pope moved to intervene. Indeed, it appears that the intense two-month application of resources cited by Alabama, Pet. at 3, occurred after Pope received his right to sue letter from the EEOC and after the filing of Pope's litigation to bring this matter before the district court.

extended factual disputes between the African-American intervenors and the State over the fact-based issues raised by their pleadings and competing expert reports. Meanwhile, Pope repeatedly urged the Court to immediately vacate the rule on the constitutional grounds raised in Pope's complaint. Only under questioning from the district court did one of the State's counsel eventually concede the unconstitutionality of the rule on April 2, 2004. Doc. no. 794. The unconstitutional rule remained in effect and Alabama continued to implement it.

On May 20, 2005, over two years after Pope first sought relief, the district court entered an order granting Pope's motion for preliminary injunction and granting the relief that he requested in his initial filing, the suspension of the No-bypass Rule. App. 3a, 32a; doc. no. 605 at p. 3 ("the movant-intervenor respectfully asks this Court for leave to intervene in this action for the purpose of challenging this unconstitutional, un-tailored race-based application of the Frazer/Ballard injunction . . ."); *and* Complaint and Motion to Modify Injunction of Plaintiff-Intervenor Timothy D. Pope, doc. no. 659, ¶18 (urging the Court to "modify the injunction by vacating the no-bypass rule and other race-based requirements and/or alternatively ordering the defendants to implement lawful race-neutral selection procedures").

Pope obtained actual relief on the merits that materially altered the legal relationship between the parties by modifying the defendants' behavior. Pope prevailed in this litigation by securing the race-neutrality of the State defendants' employment selection procedures through the grant of his motion for relief from "the continued implementation of the race-conscious,

indeterminate, across-the-board no-bypass rule." App. 33a. The district court stated that this relief was granted "based on Pope's motion." App. 32a. The State then ceased implementation of the No-bypass Rule.

As required by Rule 54(d)(2), F.R. Civ. P., on June 1, 2005 Pope filed a motion for attorney's fees and costs. Doc. nos. 740, 744, 747. The State defendants opposed the motion claiming Pope was not a prevailing party. Doc. no. 748.[3]

On June 30, 2006, after further extended briefing and factual disputes between the other parties, the district court granted Pope's motion for summary judgment and entered final judgment permanently ending the No-bypass Rule. App. 24a, 25a. The Court's order states plainly that "Pope's motion for summary judgment (doc. no. 757) . . . [is] granted." *Id.* The district court further stated that "intervenor Pope's motion to modify injunction (doc. no. 659) [is] granted." App. 25a.

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3. In opposing the fee motion, the State launched a vituperative attack on Pope's counsel with an affidavit by State staff counsel Byrne claiming that Pope intervened for the sole purpose of gaining fees. Pope responded with three separate affidavits rebutting each of the State's claims. Neither the district court nor the Eleventh Circuit credited the State's attack and the State's new counsel in this Court concedes the matter is "immaterial." Pet., at 4 n.2. Despite that acknowledgment, one of Petitioners' amici picks up the fight where the State's lower court counsel left off, devoting four pages of its brief to a personal attack on the undersigned counsel of record. Br. of Amici Curiae International Municipal Lawyers, et al., at 12-15. The Court should take note of such an abuse of the privilege given to amici to express views on important legal issues before this Court.

Pope filed a supplemental motion for attorney's fees and costs on July 12, 2006, which the defendants opposed on the same grounds. App. 3a, 20a; doc. nos. 781, 782, 783.

B. The District Court's Order.

On September 17, 2007, the district court granted Pope's two motions for attorneys fees and awarded some 58% of the total amount requested. App. 3a, 19a, 20a. The district court held that Pope "achieved a sought-after 'judicially sanctioned change in the legal relationship of the parties'" as required by *Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001). App. 13a.

The district court found that Pope made a separate contribution to the litigation warranting an award of fees. App. 15a. The district court also found that Pope and the State defendants made different arguments to end the no-bypass rule. Characterizing Pope's position as "forceful" the district court attributed the preliminary suspension of the rule largely to Pope's efforts. App. 17a.

In determining the amount of Pope's fee award, the Court generously discounted the requested amount to the benefit of the defendants, subtracting 30% of the requested fees up until the granting of the preliminary injunction and 60% of the requested fees thereafter.[4]

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4. While Pope believed these reductions were inappropriate, and at no time did the defendants contest the (Cont'd)

The court also deducted $5,000.00 of the fees Pope's attorneys claimed for work performed litigating fee issues and deducted all fees incurred that were attributed to an unsuccessful motion for class intervention. The district court ordered that all of Pope's expenses be reimbursed by the defendants. App. 17a-19a.

The State defendants appealed the district court's order, disputing the district court's determination that Pope is a prevailing party under the applicable fee-shifting statutes and arguing that he was entitled to nothing. App. 3a, 4a. While no stay was sought, the State failed to comply with the district court's order.

C. The Eleventh Circuit's Affirmance.

The Eleventh Circuit upheld the district court's award of attorney's fees in all respects on June 18, 2008. First, the appeals court recognized that Pope succeeded in obtaining a judicially changed legal relationship between the parties, thereby meeting the prevailing party test under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *Texas State Teacher's Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989) and *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). App. 4a.

(Cont'd)
requested hourly rates, he also recognized that appellate review of the district court's decision is governed by the abuse of discretion standard and fee issues should not result in a "second major litigation." Hence, Pope did not increase the costs or burden the appellate court with a cross-appeal.

Second, the appeals court rejected Alabama's effort to "engraft a requirement that the defendant must assume an adversarial posture as a pre-condition to finding prevailing-party status." App. 5a. Finding that "Pope's efforts contributed to a change in the State defendants personnel practices . . . Pope was . . . a prevailing party vis-a-vis the State defendants – for purposes of a fee award." *Id.*

Finally, the Eleventh Circuit upheld the district court's finding that the narrow special circumstances exception did not apply in this case. App. 5a, 6a. In doing so, the appeals court recognized the various facts the defendants asserted in support of special circumstances and opined that all were sufficiently considered when the district court substantially reduced the lodestar amount. App. 6a.

The Eleventh Circuit affirmed on June 18, 2008. No rehearing application was filed. On August 14, 2008, after Pope sought issuance of the mandate by the Eleventh Circuit, the Petitioners first moved to stay the issuance of the mandate. On August 19, 2008, the Eleventh Circuit denied the motion to stay the mandate and directed issuance of the mandate instanter. The Petitioners complied with the district court's injunctive order on August 28, 2008. *See*, *USA v. Flowers*, no. 07-18454 (11th Cir.).

REASONS FOR DENYING THE PETITION

Alabama seeks review claiming that it was aligned with Pope throughout these proceedings and therefore the district court was precluded from awarding fees to Pope to be paid by the defendants. First, as demonstrated below, the underlying claim that Pope and the Alabama defendants were "squarely aligned" is simply not factually accurate. Pet. at 5, 8. The State admits it denied Pope a promotion on the basis of his race and has fought his efforts to redress that wrong at every step for the past six years. Second, a civil rights defendant cannot avoid fee liability by agreeing with plaintiff's legal argument at the last minute when the plaintiff is forced to obtain a court order to end the defendant's discriminatory practice. Third, the State claims that a ruling from this Court is needed to explain "[w]ho is liable to *pay* attorney's fees under federal fee-shifting statutes". Pet. 11, 12 (emphasis in original). The lower courts have uniformly implemented this Court's rulings that a defendant whose conduct is changed by the litigation is the party due to pay fees and costs. This is not a case that warrants certiorari review.

This Court's decisions are clear that the central issue in evaluating a fee request is whether the litigation resulted in an order changing the legal relationship of the parties. Pope obtained a court order requiring the defendants to stop applying the race-based preference in its employment decisions. Because the State eventually agreed with Pope that the injunction should be vacated, Alabama contends that it, too, was a prevailing party and should not be liable for fees. As demonstrated below, the State of Alabama is the party that maintained a segregated employment system; the notion that it is also a "prevailing party" is preposterous.

I. This Court's Prevailing Party Standard Should Not Be Reviewed Again In This Case.

The State Petitioners seek to revise the prevailing party standard by adding an additional requirement that the defendant must actively oppose the merits of the plaintiff's claim. Alabama's argument ignores the fact that this Court's decisions all look to whether the suit has changed the legal relationship of the parties as the operative threshold test for fees under § 1988. Alabama's claim that it is a prevailing party in this case and therefore not responsible for fees is meritless. The State of Alabama and its agencies and officials were the *defendants* in an action bought by the United States over thirty-five years ago. The State was found guilty of segregative employment practices and enjoined by order of the federal courts. Having been found liable, it certainly is fair to assess the State with all costs related to the injunction, including costs incurred in ending the injunction. *See W. R. Grace & Co. v. Local 759*, 461 U.S. 757, 770 (1983) ("obeying injunctions is a costly affair").

The State of Alabama is under the delusion that it "won" the case when the injunction was ended in 2005. The fact that the injunction was ended does not change the fact that the State was the defendant in civil rights litigation and found liable for maintaining a segregated workforce. The State did not prevail when the order was eventually lifted. It was the *loser* in 1970 and remains the loser until the case is closed. The State did not succeed by obtaining an order changing its own conduct. The State remains the defendant in a case where liability was established. Nothing changes the principles of the fee-shifting statute requiring the civil rights defendant

to pay fees to a party that successfully changes the defendant's conduct through the litigation process.

Both the district court and the Eleventh Circuit found that Pope met the traditional standard for prevailing party status under this Court's decisions. App. 4a, 13a. The State claims that it, too, is a prevailing party and as a consequence Pope should be denied fees. But, as the district court's decision demonstrates, having found Pope to be a prevailing party and after calculating the lodestar amount, the district court then substantially reduced the fee to one which, in the district court's view, represented Pope's separate contribution to the litigation.

This Court's prevailing party standard need not be revisited. In determining responsibility for payment of fees, this Court has always looked to the party responsible for the provision of relief. Just two Terms back, in *Sole v. Wyner*, 551 U.S. __, 127 S. Ct. 2188 (2007), this Court unanimously reconfirmed that the standard for an award of fees to a prevailing party is the material alteration of the legal relationship of the parties:

> "The touchstone of the prevailing party inquiry," this Court has stated, is "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-793, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). See *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987) (plaintiff must "receive

> at least some relief on the merits of his claim before he can be said to prevail"); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980) (upholding fees where plaintiffs settled and obtained a consent decree); cf. *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 844 (2001) (precedent "counsel[s] against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties").

Id. at 2194.

This Court's decisions have consistently followed the principle that fees should come from the party responsible for providing relief. *Flight Attendants v. Zipes*, 491 U.S. 754, 762 (1989). The Eleventh Circuit's decision here is entirely consistent with that principle. The State denied Pope a promotion on the basis of his race claiming it had no option but to reflexively implement the thirty year old No-bypass Rule. Pope was left with no option but to seek an order from the federal court directing Alabama to stop applying the race-based No-bypass Rule. *See also Hewitt v. Helms*, 482 U.S. 755,761 (1987) (central to prevailing party status is "the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*") (emphasis by the Court).

In this case, the State of Alabama was found responsible for the provision of relief when it was found liable in 1970. As the enjoined party, it was the *loser* in this case. Again, in 2005, it was found responsible for provision of relief to Pope when he obtained an order requiring the State to stop applying the No-bypass Rule to Pope's employment opportunities. The State was the party directed to provide relief – both in 1970 and again in 2005 for Pope.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court addressed the question that the Petitioners claim should now be reviewed. The Court confirmed that the party responsible to pay attorney's fees is the defendant whose conduct is changed by the litigation:

> [I]t is clear that the logical place to look for recovery of fees is to the losing party – the party legally responsible for relief on the merits. That is the party who must pay the costs of the litigation, see generally Fed Rule Civ Proc 54(d), and it is clearly the party who should also bear fee liability under § 1988.

473 US at 164. This Court concluded that "liability on the merits and responsibility for fees go hand in hand . . .". *Id.* at 165. This Court has defined the term "losing party" as "the party legally responsible for relief on the merits." Contrary to its posturing as the winner, the State of Alabama is the party legally responsible for relief on the merits and was properly assessed fees when Pope obtained an order that changed the State's conduct vis-a-vis Pope.

As demonstrated in Part III, below, the decisions of the lower courts are entirely consistent with this Court's precedents requiring that the material change in legal relationship between the parties triggers the right to fees under the statute.

II. The State Was Never Aligned With Pope.

Alabama repeatedly claims it was aligned with Pope and there was no difference in their positions in this case. Pet. at 5, 12, 13, 17, 22, 25, 27. That claim is absolutely disputed and contrary to the holdings of the courts below. Both the district court and the Eleventh Circuit recognized the differences in the positions taken by the State and Pope and the practical effect of those differences. The Eleventh Circuit made a finding that Pope prevailed vis-a-vis the State "because Pope's efforts contributed to a change in the State defendants' personnel practices." App. 5a. While the State agreed with Pope's constitutional argument late in the process, it was the fact that Pope succeeded in obtaining a court order changing the State's conduct that made Pope a prevailing party due to receive fees.

Contrary to the State's claims, Pope was never "squarely aligned" with the State. Pet. 5, 27. It is undisputed that Pope was denied a promotion, filed an EEOC change, and left with no recourse but to file litigation seeking an immediate end to an unconstitutional practice. After he moved to intervene in this case, the State delayed these proceedings and opposed Pope's motion to intervene. Doc. no. 633. The State refused to join his argument that the rule was

patently unconstitutional and due to be immediately stopped, opting instead for the more politically palatable claim that the 1970 order was due to be vacated under the *Freeman v. Pitts*, 503 U.S. 467 (1992) standards for ending desegregation orders. Doc. no. 634, at p. 12. The State slowed the proceedings down with its wasteful fact-intensive battle of highly-compensated experts with the African-American intervenors. Finally, after two years of delays occasioned primarily by the litigation strategies of the State's counsel,[5] the district court granted Pope's motion to preliminarily enjoin operation of the rule on the very grounds advocated by Pope from the outset – that the policy was facially unconstitutional as a matter of law. App. 15a, 34a.

The district court found that Pope was justified in initiating his actions in this case:

> . . . [W]hen Pope filed his motion to intervene in February 2003, the rule still applied to him, and, indeed, according to him, he had been, and continued to be, denied promotions

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5. On April 2, 2004, the district court conducted a conference among counsel. During that conference, not only were there differences between the parties concerning the applicable standards for evaluation of the No-bypass Rule, there was confusion between the State's own counsel. *Compare*, comments of State attorney Byrne (advocating *Freeman* standard) with those of State attorney Weller (agreeing for the first time with Pope's facial constitutional argument). Doc. no. 794, pp. 5-15. And, the United States refused to take a position on the applicable standard at all. *Id.*, at 11. Indeed, both the United States and the State of Alabama deferred to Pope on the constitutional issue. *Id.* at 11-14.

> because of the rule. He therefore had a *real* and *live* dispute with the State at that time.

App. 14a. The district court further recognized that it was Pope's argument that led to the suspension of operation of the rule in 2005:

> Pope's forceful position in this case, that the no-bypass rule was unconstitutional on its face and should be terminated immediately without any consideration of evidence from any of the other parties, played a substantial role in convincing the court that the rule should be suspended early . . .

App. 7a.

The district court recognized that while the State and Pope ultimately sought an end to the No-bypass Rule, first, they approached the problem with very different arguments, and, second, it was Pope's argument that was credited with leading to the initial suspension of the rule. The notion that Pope and the State were "squarely aligned" is simply false.

III. There Is No Circuit Split For This Court To Reconcile.

Petitioners have not demonstrated any split between the circuits that merits review by this Court. The Second and Seventh Circuit cases cited by the State of Alabama did not involve facts where the party claiming fees met the threshold test for prevailing party status by obtaining an order changing the defendant employer's

conduct. Those cases only involved a victory by the plaintiff on procedural issues. The case from the D. C. Circuit involved the application of a different statute with different operative language. None of the three cases cited by the State support the stark split in the circuits asserted in the Petition. Moreover, both the Seventh and D. C. Circuits have subsequently decided cases in a manner consistent with the Eleventh Circuit's decision here.

1. In the Second Circuit's decision of *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), black plaintiffs were denied fees against the defendant employer when they successfully resisted intervention by a group of nonparty white employees. The black employees in that case were properly denied fees because their successful opposition to intervention did not meet the prevailing party test. The *Firebird Society* plaintiffs did not change the defendant's conduct by opposing an intervention motion. While the Second Circuit observed that the plaintiffs "were as much prevailing parties . . ." as the defendants in opposing intervention, neither met the prevailing party test of this Court's subsequent precedents when they successfully opposed a procedural motion by nonparties.

2. In *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), the court awarded attorney's fees against a federal agency under the Equal Access to Justice Act ("EAJA"). The court denied fees on one minor issue on which the court noted the plaintiff and government took the same position. While noting in passing the agreement of the

plaintiff and defendant on the single issue, the court's decision on the point turned on the language of the EAJA, which materially differs from § 1988: "the [government's] position on this issue was 'substantially justified' and, consequently, fees cannot be awarded on this issue under the EAJA." Indeed, the EAJA includes specific language altering the standard for awarding fees from that of § 1988.

3. The Seventh Circuit's decision in *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), is another case where black plaintiffs that succeeded in defending a court order against the claims of white intervenors were denied fees payable by the defendant employer. In *Bigby*, the Seventh Circuit rejected the plaintiffs' claims that they were "prevailing parties" under the *Texas State Teachers* standard. The Seventh Circuit agreed that a "Title VII defendant's fee liability does not presumptively extend to cover the fees incurred by plaintiff in litigating third party interests . . ." 927 F.2d at 1428, 29. Again, this Seventh Circuit case did not involve a successful effort by the party seeking fees that changed the defendant's conduct by court order. Rather, it demonstrated a correct application of the *Texas State Teachers* standard governing prevailing party status that focuses on the results of the litigation.

Neither of the two § 1988 cases cited by the Petitioners in support of their circuit-split allegation involved a plaintiff seeking fees that obtained some substantive change in conduct by the defendant as a result of the litigation. In this case, the Eleventh Circuit found that Pope was a prevailing party because he succeeded in obtaining the "judicially sanctioned change

in the legal relationship of the parties" required by this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001). Pope succeeded on the merits in his effort to gain a court order ending the State's application of the No-bypass Rule. The fact that the State eventually agreed with Pope's position does not change the fact that Pope had to obtain a court order to stop the State's continued application of the No-bypass Rule against Pope and similarly situated public employees.

Other cases from the Seventh and D. C. Circuits have addressed the issue of responsibility to pay fees under fee-shifting statutes in a manner consistent with the Eleventh Circuit's decision in this case. The D. C. Circuit's decision in *Turner v. District of Columbia Bd. of Elections and Ethics*, 354 F.3d 890 (D. C. Cir. 2004), addresses factual circumstances similar to that in this case. The *Turner* plaintiff sued the D. C. Board of Elections to certify the results of a ballot initiative. The United States intervened and claimed the ballot initiative violated federal law. The D. C. Board eventually agreed with the plaintiff that the federal statute was unconstitutional. The courts ultimately found the statute unconstitutional and granted plaintiff relief requiring the certification by the Board. The defendant D. C. Board then opposed plaintiff's request for attorney's fees, claiming it was not the culpable party. The D. C. Circuit appeals court rejected the Board's position finding that it was the party responsible for providing relief on the merits to the plaintiff:

> There is no basis to conclude that the Board was not "the party legally responsible for relief

> on the merits," *Kentucky v. Graham*, 473 U.S. 159, 164 (1985), as only it, and not the United States, could certify the votes on Initiative 59. Results, not litigating positions, are determinative of prevailing party status. *Hensley*, 461 U.S. at 435. Turner incurred and continued to incur attorney's fees and expenses because the Board refused to certify the election results.

354 F.3d at 897. The D. C. Circuit rejected the defendant's claim that it is excused from fee responsibility because it agreed with the plaintiff's legal argument in the same manner as the Eleventh Circuit's decision in this case:

> . . . the Board continued to enforce the Barr Amendment throughout Turner's § 1983 litigation, it is irrelevant for purposes of § 1988 that in court the Board supported Turner's constitutional challenge to the Barr Amendment.

Id. The D. C. Circuit looked to the traditional test of a change in the legal relationship of the parties to determine fee liability, just as the Eleventh Circuit did in this case. Contrary to the Petitioners' claims, the D. C. Circuit's caselaw is consistent with that of the Eleventh Circuit.

The Seventh Circuit has also addressed the same issue raised here and decided it in a manner consistent with the Eleventh Circuit's decision. *King v. Illinois State Bd. of Elections*, 410 F.3d 404 (7th Cir. 2005) was a complex multi-party voting rights case. The Seventh

Circuit ruled that intervening parties that successfully protected their constitutional interests were entitled to fees against the defendant State agency even though the state claimed it, too, was the "winning" party. "[B]ecause the intervenors were vindicating their civil rights, we think that the appropriate party from whom to seek fees in this case is indeed the State." Finding that the State had failed to make adequate efforts to ensure that its redistricting plan was constitutional, the Court found it appropriate to require the State to pay the intervenor's fees. In this case, Pope was required to bring the lawfulness of the No-bypass Rule before the district court after his complaint to State of Alabama officials was backhanded.

Alabama's assertion of a "clear, mature and acknowledged" split in the rulings of the circuits is of no substance. Pet. 19. The two § 1988 cases cited by the defendants did not involve fee-applicants that succeeded on the merits. In relatively recent decisions ignored by Petitioners and their amici, the Seventh and D. C. Circuits have ruled in a manner consistent with the Eighth and Eleventh Circuits. The Eleventh Circuit's decision here, consistent with every other circuit, correctly recognized and implemented this Court's precedents that look to the results obtained on the merits in determining fee liability. There is not one circuit court that adopts the Petitioners' argument in this case.

IV. Review By This Court Is Not Merited.

This Court has recognized that the statute imposes attorney's fees "as part of the costs." *Hutto v. Finney*, 437 U.S. 678, 695 (1979). Here, the district court and the Eleventh Circuit correctly awarded costs against the defendant State of Alabama and its agencies and officials. The State claims that Pope should have been denied fees against the State because it, too, sought vacation of the No-bypass Rule. The upshot of the State's argument is that Pope, while a prevailing party, is entitled to fees from nobody. Pope did not seek fees from the African-American intervenors because he sought and obtained no relief from them.[6] Rather, the party Pope sought relief from was the party that denied him an employment opportunity on the basis of his race.

The State of Alabama has turned what should have been a routine fee application into a "second major litigation". *Hensley*, 461 U.S. at 424. While there is no doubt that the State of Alabama and its amici are hostile to the policy objectives of § 1988, and openly disparage the motives of counsel for civil rights claimants[7], as this case demonstrates, the issue is not about liberal versus conservative principles in the proper role of federal judicial authority over states and local governments. Rather, this

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6. While Pope disagreed with the litigation positions of the African-American intervenors, their arguments did not justify fees under the *Christianburg Garment* standard for fees against plaintiffs that maintain baseless litigation.

7. *See* Petition at 27, 28, 31, 32; Brief of Amici Curiae International Municipal Lawyers, etc., at 12-15; and, *cf.*, Brief of Commonwealth of Virginia, et al., at 11.

case is about whether the plain language and principles of the fee-shifting statute benefitting those that succeed in protecting constitutional rights are to be respected.

The fee award here should have been a "run-of-the-mill occurrence." *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 739 (1980). While Alabama may grouse about its mounting obligation to pay "fees-on-fees", Pet. at 32, it alone is responsible for the multiplication of costs in this case.

This Court has adopted a bright line test governing liability for fees under § 1988: responsibility for fees follows responsibility on the merits. The circuits are unanimous on this point. There is no need for this Court to revisit the issue in this case.

CONCLUSION

Respondent Timothy D. Pope requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

RAYMOND P. FITZPATRICK, JR.
Counsel of Record
GARY L. BROWN
FITZPATRICK & BROWN, LLP
1929 Third Avenue North
Suite 600
Birmingham, Alabama 35203
(205) 320-2255

Attorneys for Respondent

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STATE OF ALABAMA, *et al.*,
Petitioners,

v.

Timothy D. POPE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Alice Ann Byrne
ALABAMA DEPT. OF PERSONNEL
64 North Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Matthew H. Lembke
John C. Neiman, Jr.
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Christopher W. Weller
CAPELL & HOWARD, P.C.
150 South Perry Street
Montgomery, AL 36102

Attorneys for Petitioners

November 25, 2008

QUESTION PRESENTED

"Numerous federal statutes allow courts to award attorney's fees to the 'prevailing party.'" *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001). The question presented here, which has divided the lower courts, is:

> Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes.

The Eighth and Eleventh Circuits have answered yes to this question; the Second, Seventh, and D.C. Circuits have all answered no.

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ARGUMENT

The State demonstrated in the petition that the Eleventh Circuit's decision—

- deepens a circuit split and reflects lower-court confusion about whether federal fee-shifting statutes permit awards against aligned, prevailing parties;
- conflicts with this Court's recognition that these statutes codify a "loser-pays" system; and
- implicates an issue of extraordinary practical importance.

Pope tries to explain away the circuit split and this Court's attorney's-fees decisions, but to no avail. As we will show, the lower courts' confusion is manifest, and the conflict with this Court's precedents is stark.

Tellingly, Pope has not denied that this case presents a question of national importance. Nor could he, given that 27 States and every major local-government group in the country have urged the Court to grant certiorari precisely *because of* the alignment issue's real-world significance.

I. The Lower Courts' Confusion Is Clear.

Pope buries his response to the circuit split deep in his opposition. And with good reason: His efforts to paper over the split are not convincing. Indeed, the only thread holding Pope's split arguments together is his persistent refusal to engage what the lower courts have actually said about alignment.

1. Pope asserts, for instance, that *Firebird Society v Members of the Board of Fire Commissioners*, 556

F.2d 642 (2d Cir. 1977), turned on the fact that the fee-seeking plaintiffs had merely "opposed a procedural motion by nonparties." Opp. 19. But that is not what the Second Circuit said at all. The *Firebird* court rejected the fee request on the ground that the government defendants "joined in opposing intervention and as to that issue were as much prevailing parties as" the plaintiffs. 556 F.2d at 644.

2. Pope likewise discounts *ASH v. Civil Aeronautics Board*, 724 F.2d 211 (D.C. Cir. 1984), as involving only a "passing" reference to alignment. Opp. 19. That, too, is incorrect. With respect to the issue presented here, the *ASH* court stated its principal holding as follows: "We agree with the Board that ASH cannot be considered a 'prevailing party' on an issue on which both ASH and the government took the same position." 724 F.2d at 216. Notably, in so holding, the D.C. Circuit cited *Firebird* for support.

3. Pope similarly tries to pass off *Bigby v. City of Chicago*, 927 F.2d 1426 (7th Cir. 1991), as involving only a routine "application of the *Texas State Teachers* standard." Opp. 20. Wrong again. What the Seventh Circuit actually *said*—relying on *ASH*—was (1) that "the Bigby plaintiffs cannot be characterized as prevailing parties vis-à-vis the City with respect to" an issue on which they agreed; and (2) that because "[t]he City was as much a prevailing party" with respect to the agreed-upon issue as the Bigby plaintiffs, the latter did "not qualify for an award of attorney's fees." 927 F.2d at 1429.

4. Moving to the other side of the split, Pope makes no effort to deal with *Jenkins v. Missouri*, 73 F.3d 201 (8th Cir. 1996), in which the Eighth Circuit acknowledged the State's invocation of *Firebird*, *ASH*, and

Bigby in support of an alignment argument—but then expressly refused to follow those decisions.

5. Pope's reliance on *Turner v. District of Columbia Board of Elections & Ethics*, 354 F.3d 890 (D.C. Cir. 2004), and *King v. Illinois State Board of Elections*, 410 F.3d 404 (7th Cir. 2005), is misplaced. Neither even begins to resolve the current confusion. The *Turner* court declined to consider the alignment issue because it had been raised "for the first time on appeal" and therefore was "not properly before the court." 354 F.3d at 897. And *King*, which arose in "the *sui generis* category of redistricting cases," merely held that because the State had made no effort whatsoever to defend a challenged reapportionment plan, it had not "prevail[ed]" in a way that would exempt it from fee liability. 410 F.3d at 409, 422 (quotations omitted).

The disorder in the lower courts is unmistakable.[1] This Court should grant certiorari to provide much-needed guidance.

II. The Conflict With This Court's Decisions Is Stark.

Pope fails to cite a single case in which this Court has authorized a fee award against an aligned, prevailing party. And he has no meaningful answer to the petition's demonstration that this Court's "entire attorney's-fees

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[1] For still further evidence of the lower-court uncertainty, compare *LULAC v. Clements*, 923 F.2d 365, 368-69 (5th Cir. 1991) (en banc) (refusing successful intervenor's request "to assess her fees, not against a losing party, but rather against the prevailing [state defendant]"), with *Pennsylvania v. Flaherty*, 40 F.3d 57, 62 (3d Cir. 1994) (indicating willingness to assess fee awards against nominally prevailing defendants).

jurisprudence rests on the assumption that federal fee-shifting statutes codify a loser-pays system." Pet. 20-25. Pope offers two responses, neither of which holds water.

1. Pope first presses a novel "once-a-loser-always-a-loser" rule. He contends that because nearly 40 years ago the State was adjudicated liable for discriminating against black workers, it remains "guilty"—even as to him—today. Opp. 12. The State, Pope says, "was the *loser* in 1970 and remains the loser until the case is closed." *Id.*

That makes no sense at all. The State's original liability for discriminating against black workers has nothing to do with this case. The State has never been found liable in this case for discriminating against Pope or, for that matter, any other white worker. Indeed, this case isn't about discrimination at all. This case is about terminating the No-Bypass Rule. That is the *sole* issue for which Pope sought fees. And on that issue, the State most certainly was *not* a loser. Litigating alongside both the United States and Pope, the State obtained precisely the relief it sought.

Logic aside, Pope's once-a-loser rule finds no support in the law. Indeed, it is well settled that an enjoined defendant is not a loser in perpetuity *even vis-à-vis the original prevailing plaintiff*. Rather, even in that scenario, "[a]ncillary or offshoot proceedings" that are "clearly separable from the proceeding that led up to the entry of the decree" are sensibly treated as discrete cases for fee-shifting purposes. *Alliance to End Repression v. City of Chicago*, 356 F.3d 767, 771-72 (7th Cir. 2004) (Posner, J.). That principle—that winners and losers are determined on a phase-by-phase basis—applies *a fortiori* here, where the State indisputably never "lost" on the lone issue to which the fee request pertains. *Cf.*

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 549 (1986) (separating disputes into "phases" is "a system for analyzing requests for attorney's fees and costs that appears to be useful in protracted litigation").

Pope's retort also highlights one of the most urgent concerns that the State and local-government *amici* have expressed about the Eleventh Circuit's decision. A rule making government defendants liable for their aligned co-parties' attorney's fees will have pernicious effects in the thousands of institutional-reform cases (like this one) that are presently pending in courts around the country. State Br. 5, 8-11; Local Br. 5-12, 17-23. Whereas many institutional-reform decrees "are decades old and require frequent modification (or abolition) as factual circumstances change and the legal landscape evolves," the Eleventh Circuit's rule exposes States and municipalities to fee requests "virtually every time any such change occurs—even if the [government defendant] itself initiates the change." Local Br. 5. The problem is that almost *every* institutional-reform decree has its genesis in a finding of governmental liability. If, as Pope seems to believe, that initial (and often distant) finding automatically puts the government defendant on the hook for all subsequent fee requests—whenever, from whomever, and about whatever—then States and municipalities "will understandably hesitate before seeking to modify obsolete injunctions and consent decrees." *Id.* at 21.

2. Relatedly, Pope insists that despite the State's complete success in the termination litigation, it *must* be liable to pay his lawyers' bill, lest he be "entitled to fees from nobody." Opp. 24. But there is no inalienable right to recoup legal fees. Federal fee-shifting statutes are not lawyers'-full-employment acts; they exist to ensure "an *appropriate* level of enforcement." *Buckhannon Bd.*

& Care Home, Inc. v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 620 (2001) (Scalia, J., concurring). Where, as here, "the State is devoting its resources to obtaining the very relief the plaintiff seeks, the private litigant already has a champion," and "a fee award is not justified." State Br. 13.

When Pope moved to intervene, both Alabama and the United States promptly objected. In no uncertain terms, they told him that his services were not needed and reassured him that his interests "were adequately represented" (App. 3a) because, just like him, they sought "to terminate the no-bypass rule." Doc. 632, p.4; *accord* Doc. 633, p.2. Having bulled ahead in the face of that clear warning, Pope's "entitled-to-fees-from-nobody" lament rings hollow. If ever there were a case in which a fee award would result in an unjustifiable "windfall[]," this is it. *Hensley v. Eckerhart*, 461 U.S. 424, 444 (1983) (Brennan, J., dissenting).

III. Pope's Efforts To Evade The Question Presented Are Unavailing.

Rather than join issue on the question that this case presents—whether an aligned, prevailing party can be made liable for a co-party's attorney's fees—Pope deploys a series of smokescreens aimed at suggesting that the case may not present the alignment question at all. Pope's diversionary tactics, however, cannot be squared with the record and thus cast absolutely no doubt on this case's evident certworthiness.

Before setting the record straight, there is an important point worth emphasizing at the outset: Neither the district court nor the Eleventh Circuit questioned the fact of the parties' alignment. To the contrary, both

courts took it as given—and decided the case based on the premise—that the State's and Pope's interests were aligned because both parties sought and obtained the No-Bypass Rule's termination. App. 3a, 13a. They simply held that "as a matter of law" the parties' alignment did not preclude a fee award. App. 5a. It is that "pure legal issue" (Pet. 33) that the State now asks this Court to consider.

A. The State Aggressively Sought The No-Bypass Rule's Termination.

Pope first tries to paper over the parties' alignment by simply writing the State out of the story altogether. Indeed, reading Pope's opposition, one might wonder whether the State played *any* active role in the No-Bypass-Rule litigation. Nowhere is Pope's creative editing more apparent than in his discussion of the district court's June 2006 order finally terminating the Rule. Pope describes that order as follows:

> The Court's order states plainly that 'Pope's motion for summary judgment (doc. no. 757) ... [is] granted.' *Id.* The district court further stated that 'intervenor Pope's motion to modify injunction (doc. no. 659) [is] granted.'

Opp. 7. The truth, however, is lost among the ellipses and brackets. Compare Pope's description with what the district court's order actually says, with emphasis added to highlight Pope's omissions:

> (1) Intervenor Timothy D. Pope's motion for summary judgment (doc. no. 757) *and the State defendants' motion for summary judgment (doc. no. 759) are* granted.

> (2) *Plaintiff United States of America and the State defendants' joint motion to terminate no-bypass provisions of injunctive orders (doc. no. 634) and* intervenor Pope's motion to modify injunction (doc. no. 659) *are* granted.

App. 24a-25a.

Pope likewise asserts that the district court described its May 2005 order preliminarily suspending the Rule as being "'based on Pope's motion.'" Opp. 7. What the district court actually said was that "*[f]or the reasons stated in the court's April 29 order and* based on Pope's motion, the court will grant the suggested preliminary relief." App. 32a (emphasis added). Significantly, in its April 29 order the district court had emphasized that "the evidentiary record *submitted by United States and state defendants* shows a strong likelihood that, when all is said and done, the rule cannot continue." App. 29a (emphasis added). On that basis, the court granted *both* the State defendants' and United States' joint motion *and* Pope's motion:

> (1) The joint motion to terminate the no-bypass rule (Doc. No. 634) is treated as a motion for preliminary relief filed by defendants and said motion is granted.
>
> (2) Plaintiff intervenor Timothy Pope's motion for preliminary relief (Doc. No. 732) is granted.

App. 34a.

There is no need (or room) to multiply examples. Suffice it to say that Pope consistently portrays the No-Bypass Rule's termination as a solo effort in which the

State played no role. *See* Opp. 1 ("Pope obtained an order ...."), 6, 7, 11, 13, 14, 15, 16, 17, 21. The truth, as reflected in the district court's and the Eleventh Circuit's own opinions, is that the State and Pope litigated the termination issue hand-in-hand, side-by-side. *See* App. 2a-3a, 4a, 8a-10a, 13a, 21a-22a, 24a-25a, 27a-28a, 29a, 30a, 31a, 32a, 34a.

B. The State Urged The Rule's Termination From The Very Outset Of The Litigation.

To the extent Pope acknowledges the State's presence in the case at all, he consistently insinuates that the State was merely a latecomer who hopped the termination train as it was leaving the station. He asserts, for instance, that the State agreed with his position only "at the last minute" and, indeed, even rephrases the Question Presented so that it applies only to a defendant who "belatedly agrees with the plaintiff's position on the merits." Opp. i, 11. Pope's suggestion that the State was (at best) riding his coattails is a consistent theme of his opposition. *See id.* at 1, 3, 4, 5, 11, 16.

It is also verifiably false. We have already explained in detail that the State's efforts to terminate the No-Bypass Rule predated Pope's arrival on the scene. Pet. 3-8. But the Court needn't take our word for it. The district court's own chronology demonstrates that the timing point is not debatable. App. 8a-10a. As does the Eleventh Circuit's summary, which opens with the "undisputed" fact that "the State defendants commenced a review of the continuing necessity of the No-bypass Rule in May 2002, well *before* Pope moved to intervene." App. 2a.

C. The State And Pope Sought And Obtained Precisely The Same Relief.

Pope also seeks to mask the parties' alignment by asserting that "while the State and Pope ultimately sought an end to the No-bypass Rule ... they approached the problem with very different arguments." Opp. 18; *accord id.* at 4-5, 6, 8, 13, 16, 17. Even if that were true (it isn't[2]), it wouldn't make a bit of difference. In determining prevailing-party status—and thus alignment, as well—"[t]he result is what matters," not the "legal grounds for a desired outcome." *Hensley*, 461 U.S. at 435. The State and Pope indisputably sought and obtained the same "result."

Indeed, Pope's fixation on the nuances of the parties' litigating positions highlights one of the principal problems with allowing aligned parties to seek fees. "Because the amount that plaintiffs and intervenors can recoup from aligned defendants will necessarily be tied to the nature and extent of their contributions to the relief obtained, they will nearly *always* find it necessary to engage in 'major' fee-related litigation." Pet. 32. Pope's opposition, which obsesses over who argued what (and when, and to what effect) and repeatedly seeks to outline and justify his own "contribution" to the litigation, is powerful evidence of the coming fee-litigation explosion that we have described. *Id.* at 31-33. Far from "simplifying]" it "to the maximum extent possible," the Eleventh Circuit's rule only makes fee litigation more "protracted, complicated, and exhausting." *Pennsyl-*

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[2] The State *repeatedly* made the constitutional argument for which Pope takes sole credit. *See, e.g.*, Doc. 663, ¶¶13-15 (answer); Doc. 760, pp.14-23 (summary judgment brief); Doc. 794, Exh. A, pp.13-15 (status conference).

vania v. Delaware Valley Citizens' Council, 483 U.S. 711, 722 (1987).

D. Pope's Separate Discrimination Suit Has No Bearing On The Parties' Alignment Here.

Finally, in attempting to obscure the parties' alignment, Pope consistently conflates the two separate lawsuits in which he is currently involved. *See* Opp. 1, 3, 11, 14, 16, 24. As we have explained (Pet. 4), after his promotion was rescinded as violative of the No-Bypass Rule, Pope did two things. First, "[s]eeking individual redress for the forfeited promotion," he sued the State, alleging that its compliance with the Rule violated Title VII and the Equal Protection Clause. *Pope v. Alabama*, 2008 WL 2874483, at *3 (M.D. Ala. 2008). In that private suit, Pope sought retrospective relief including instatement to the position he would have held but for the rescission, back-pay, and compensatory damages (and attorney's fees, as well). Second, and separately, Pope moved to intervene in the ongoing *Frazer* action "for the purpose of seeking modification or vacation" of the No-Bypass Rule on a prospective basis. Doc. 605, p.1.

To be sure, the State is adverse to Pope in his separate discrimination suit, which is presently on appeal to the Eleventh Circuit. If Pope ultimately prevails there—he lost in the district court—he will be entitled to seek an award of attorney's fees, and the State has never suggested otherwise. But as the summary above makes clear—and as both the district court and the Eleventh Circuit correctly recognized—the State's and Pope's interests in *this* case are precisely aligned. As the district court explained, when Pope formally intervened in *Frazer*, he "*joined* the United States and the state defendants in their termination motion." App. 22a, 27a-28a (emphasis added).

* * *

The fact therefore remains that "from the very outset of this litigation, the interests of the United States, the State defendants and Pope have, as relevant here, been squarely aligned." Pet. 5. Based on that premise, the Eleventh Circuit decided—and the petition now squarely presents—a pure legal issue: Can an aligned, prevailing party be put on the hook for a co-party's fees? Given the uncertainty in the lower courts, this Court should take this opportunity to definitively resolve that important question.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Troy King
Attorney General
Corey Maze
Solicitor General
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130

Alice Ann Byrne
ALABAMA DEPT. OF PERSONNEL
64 North Union Street
Montgomery, AL 36130

Kevin C. Newsom
Counsel of Record
Matthew H. Lembke
John C. Neiman, Jr.
BRADLEY ARANT ROSE & WHITE LLP
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8803

Christopher W. Weller
CAPELL & HOWARD, P.C.
150 South Perry Street
Montgomery, AL 36102

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STATE OF ALABAMA, et al.,

Petitioners,

v.

TIMOTHY D. POPE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 26 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

WILLIAM C. MIMS
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

October 17, 2008

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TERRY GODDARD
Arizona Attorney General

JOHN W. SUTHERS
Colorado Attorney General

BILL MCCOLLUM
Florida Attorney General

THURBERT E. BAKER
Georgia Attorney General

MARK J. BENNETT
Hawaii Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

STEVE CARTER
Indiana Attorney General

DOUGLAS F. GANSLER
Maryland Attorney General

MARTHA COAKLEY
Massachusetts Attorney General

MICHAEL A. COX
Michigan Attorney General

MIKE MCGRATH
Montana Attorney General

JON C. BRUNING
Nebraska Attorney General

CATHERINE CORTEZ MASTO
Nevada Attorney General

ANNE MILGRAM
New Jersey Attorney General

WAYNE STENEHJEM
North Dakota Attorney General

NANCY H. ROGERS
Ohio Attorney General

W.A. DREW EDMONDSON
Oklahoma Attorney General

HARDY MYERS
Oregon Attorney General

THOMAS W. CORBETT, JR.
Pennsylvania Attorney General

HENRY MCMASTER
South Carolina Attorney General

LAWRENCE E. LONG
South Dakota Attorney General

ROBERT E. COOPER, JR.
Attorney General and Reporter of Tennessee

GREG ABBOTT
Attorney General of Texas

MARK L. SHURTLEFF
Utah Attorney General

DARRELL V. MCGRAW, JR.
West Virginia Attorney General

BRUCE A. SALZBURG
Wyoming Attorney General

QUESTION PRESENTED

Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorneys' fees—and whose interests are therefore aligned with those of the would-be fee payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes.

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INTEREST OF AMICI[1]

The question presented in the petition is one of considerable importance and practical significance to the States. Several points are indisputable. First, as frequent litigants in the courts of the United States, the States are exposed to a wide range of attorneys' fee-shifting statutes. Second, attorneys' fee awards often involve substantial sums. Third, particularly at a time of great budgetary strain,[2] the States would rather devote their limited resources to solving real problems than litigating about attorneys' fees. Moreover, protracted fee litigation and improper fee awards will deter the States from vigorously enforcing state and federal law. Finally, and importantly here, during the course of litigation, the States' interests often are aligned with those of a variety of other private litigants.

Under the law in three Circuits, the States are exposed to attorneys' fees only if they lose. In contrast, under the emergent view adopted by the Eighth and Eleventh Circuits, the States perversely

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[1] Counsel for Virginia by written letter has informed counsel for the parties of its intent to file this brief.

[2] The National Conference of State Legislatures noted in April 2008, in its State Budget Update, that, "[w]ith a few exceptions, state finances are deteriorating, in some cases considerably." Available at: http://www.ncsl.org/programs/fiscal/sbu200804.htm. These cuts have had a considerable impact on many State Attorneys' General. *See* Lynne Marek, *State AG Offices Struggle with Cuts*, National Law Journal, Sept. 15, 2008.

face exposure to attorneys' fees from an aligned party even if they win. This state of confusion requires state litigants to focus on fee exposure rather than the merits of the controversy.

The States urge this Court to grant the petition for certiorari to resolve this important issue and to restore needed clarity to the law.

SUMMARY OF THE ARGUMENT

The Petition should be granted for several reasons. First, the States need clarity in this area of the law. Put simply, the States need to know with some certainty when and under what circumstances they can be subjected to attorneys' fee awards. Attorneys' fees can represent a considerable expense. In addition, disputes about attorneys' fees often become "second major litigation[s]"—and add a second layer of expense—for the States. Clarity in the law regarding exposure to attorneys' fees thus is absolutely critical for the States. At present, the Circuits are divided on the issue of whether an aligned party can recoup fees from the State, even where the State requests the very same relief as the aligned party and even where the State prevails in that request. This uncertainty promotes protracted satellite litigation on the issue of fees that bogs down the judicial process and consumes scarce state resources.

Second, the question presented can be expected to recur with great regularity. States are frequent litigants in a variety of cases involving, for instance, law-enforcement, corrections, education, and environmental laws. In these and many other areas, Congress has enacted fee-shifting statutes. So too, in these and other areas, States often find themselves subject to long-running and multi-faceted injunctions and decrees that, from time to time, need to be modified or abrogated. Finally, in litigating these cases, States often find themselves aligned with other litigants. These cases are fertile ground for fee litigation, and the Eleventh Circuit's rule—under which aligned parties may seek fees from the State even though the State has prevailed—threatens to expand fee litigation exponentially.

Third, awarding fees against an aligned party contradicts the purposes underlying attorneys' fee statutes. The primary purpose behind fee-shifting is to ensure that a litigant can secure a champion in the courts. That rationale does not apply when a State is advocating for the same relief. Another justification for fee-shifting is that the wrongdoer should be made to pay for violating the rights of another. Where a State prevails, and has advocated a position that benefits the fee claimant, the State has not wronged that same fee claimant.

Finally, awarding fees against an aligned, prevailing party is inconsistent with the two dominant paradigms for fee-shifting and the congressional intent that underlies these statutes:

the "American Rule," where each litigant covers his own attorneys' fees, and the "English Rule," where fees frequently are shifted to the loser. Awarding fees against a party that is litigating *alongside* the fee seeker fits neither paradigm. Had Congress intended such a radical departure from these historical models, it would have made its intent clear.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESTORE CLARITY TO THE LAW.

A. The States need to know at the outset of litigation when and under what circumstances they risk exposure to attorneys' fees.

It is crucial for any litigant, and particularly the States, to know from the outset of litigation about exposure to attorneys' fees. Attorneys' fees can be significant[3] and, in fact, can dwarf any damages

[3] For example, the State of Virginia presently is litigating a claim of attorneys' fees totaling $716,478. *Brooks v. Vassar*, No. 3:99cv755 (E.D. Va. 2008). Attorneys' fees can be assessed based on a "prevailing rate." *Blum v. Stenson*, 465 U.S. 886, 889 (1984); *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorneys' fees . . . are to be based on market rates for services rendered."). These rates, of course, consistently have risen over the years. *See* Lindsay Fortado, *Hourly Billing Rates Continue to Rise*, National Law Journal, Dec. 12, 2005; Leigh Jones, *Law Firms Continue to Raise Rates*, National Law Journal, Dec. 6, 2006; Ruth Singleton, *Billing Rates Remain High*, National Law Journal, Dec. 16, 2002 (noting that "[a]lthough not huge, increases are the norm").

award. Exposure to attorneys' fees can affect the way a State responds to litigation or even whether the State initiates litigation. For example, a State may find it tactically wise to settle a case, even when the State believes its position is meritorious, simply to avoid the risk of a substantial fee award. Similarly, a State may decline to file or intervene in an action it believes is meritorious if doing so risks a large attorneys' fee award.

Although exposure to attorneys' fees is an important concern for any litigant, these concerns are magnified for the States. As further explained below, the States frequently must litigate in federal court to defend state statutes and regulations or to seek the modification or termination of long-running injunctions and decrees. In many frequently litigated areas, such as corrections, housing, and the environment, Congress has enacted fee-shifting statutes. In litigating these cases, the States frequently find themselves aligned with, and litigating alongside, another party. Therefore, the issue presented by the petition is of great consequence to the States.

While the States need clarity, at present, the Circuits are divided on the question of whether an aligned, prevailing party can be made to pay attorneys' fees. In the Eighth and Eleventh Circuits, a plaintiff can obtain attorneys' fees against an aligned state party who prevailed. *United States v. Flowers*, No. 07-14854, 2008 WL 2440028 (11th Cir. June 18, 2008); *Jenkins v. Missouri*, 73 F.3d 201, 204

(8th Cir. 1996). In contrast, in the Second, Seventh, and D.C. Circuits, a litigant who is aligned with the prevailing state party cannot recoup attorneys' fees. *Firebird Soc'y v. Members of the Bd. of Fire Comm'rs*, 556 F.2d 642, 643-44 (2nd Cir. 1977); *Bigby v. City of Chicago*, 927 F.2d 1426, 1429 (7th Cir. 1991); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 724 F.2d 211, 216 (D.C. Cir. 1984).

The question that the petition presents thus is important to the States and ripe for decision. This Court should grant the petition for a writ of certiorari to clarify the law.

B. Lack of clarity promotes needless litigation.

Clarity in the law governing attorneys' fees is important not only so a State can know whether to settle, to intervene, or even to file a lawsuit in the first place, but also so a State can avoid needless collateral litigation on the issue of attorneys' fees. This Court has emphasized the need to avoid turning disputes about attorneys' fees into "second major litigation[s]." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). Until this Court resolves the issue, the States will continue to face claims by aligned parties that they are entitled to fees, even with respect to issues in which the State prevailed.

The amorphous standards employed by the Eighth and Eleventh Circuits inevitably will encourage "second major litigation" at the district

court level. These vague standards provide a powerful incentive for the fee claimant to seek fees and then, if necessary, to appeal any adverse decision by the district court. The Eleventh Circuit concluded that the intervening plaintiff was entitled to fees because his "contribution was a substantial force" in the district court's decision. Pet. App. 5a. Establishing what constitutes a "substantial force" in a court's decision is hardly subject to ready determination. Every aligned litigant will make such claims which the States will have no choice but to oppose. These disputes will be time-consuming and will require courts to make difficult analyses of hotly contested facts.

The standard employed by the Eighth Circuit is no better. Plaintiffs who seek the same relief as the State are entitled to fees because intervening parties need a "means for paying their attorneys" in cases where litigation "can continue for years and affect nearly everyone in the community." *Jenkins*, 73 F.3d at 204 n.3. The Eighth Circuit also reasoned that fees are justified when a type of litigation "seldom results in a monetary recovery." *Id.* Although *Jenkins* dealt with school desegregation litigation, the open-ended criteria applied by the Eighth Circuit cover a variety of situations. In the States' view, when a litigant is aligned with the State and has requested the same relief, that aligned litigant is not entitled to attorneys' fees from the State. A contrary rule—or even uncertainty—will essentially ensure a proliferation of "second major litigation" on attorneys' fees. The

States urge the Court to grant certiorari to avoid that circumstance.

II. THE SITUATION PRESENTED IN THE PETITION IS ONE THAT THE STATES EXPERIENCE WITH GREAT FREQUENCY.

Congress has enacted a wide variety of statutes that deviate from the American Rule and authorize a court to award attorneys' fees to prevailing plaintiffs. By one estimate, Congress has enacted more than 200 such statutes. Alan Hirsch & Diane Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center, 2d ed. 2005). *See also Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (appendix to opinion of Brennan, J., dissenting). These statutes allow fee-shifting in areas that the States litigate frequently.

The States constantly are engaged in defending their statutes and regulations from constitutional challenges under, for example, the Eighth Amendment, the First Amendment, and the Fourth Amendment cases involving prisons, law-enforcement, mental-health facilities, and schools. Several statutes authorize fee-shifting for this recurring litigation. *See* 42 U.S.C. § 1988 and 42 U.S.C. §§ 2000a-3(b), 2000b-1, 2000e-5(k).[4]

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[4] *See also* 42 U.S.C. § 12205 (Americans with Disabilities Act); 42 U.S.C. § 1973*l*(e) (Voting Rights Act); 20 U.S.C. § 1415(i)(3)(B) (Individuals with Disabilities Education Act).

Often, these cases—and the fee requests that accompany them—result in comprehensive and continuing injunctions or consent decrees. Although the number of federal injunctions and decrees cannot be determined with certainty, there is no doubt that they are a staple of modern litigation. *See* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (noting the existence of "thousands of federal consent decrees that currently exist"). As time passes, and as the decrees become factually or legally outdated, the States inevitably will seek to modify or terminate them. Under the Eleventh Circuit's rule, every motion to modify risks triggering an intervention and a subsequent fee petition.

Environmental litigation is another common source of fee disputes for the States. The States often defend environmental statutes and regulations from "both sides"—on the one hand, against environmental groups and concerned citizens who claim the regulations are too lax, and on the other hand, against claims brought by industry groups who assert that the regulations are too onerous. Again, Congress has enacted provisions in the environmental statutes that allow for fee-shifting. *See* 33 U.S.C. § 1365(d) (Clean Water Act); 42 U.S.C. § 7607(f) (Clean Air Act).

A State frequently has to defend its laws or regulations or litigate an injunction in one or more of these areas where it is aligned with some other party in the case. Under the Eleventh Circuit's rule, that

aligned party could then make a claim for attorneys' fees against a prevailing State. For example, in this Court's recent decision in *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 794 (2008), the New York County Democratic Committee, New York Republican State Committee, Associations of New York State Supreme Court Justices in the City and State of New York, as well as the State Association's president, intervened with the State Board of Elections to defend the constitutionality of the method of selection for party nominees. When insurers challenged, on constitutional grounds, a Texas law prohibiting insurance companies from operating and owning body shops, the state defendants found themselves aligned with two intervenors: the Automotive Service Association, a national organization of auto body shops, and Consumer Choice in Auto Body Repair. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 154 n.1 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008). As the case at bar illustrates, a State seeking to modify or dissolve an injunction may find itself aligned with an individual plaintiff or any of a number of other concerned parties. Consider, for example, *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 541 (6th Cir. 1982), in which the local firefighters union intervened on the side of the City to protect its members' interests in modifying a consent decree governing the City's hiring practices.

So too when industry attacks a State's environmental law, the State may be aligned with public interest organizations. Conversely, when an

environmental advocacy group challenges a State law or regulation, the State often will find itself litigating alongside particular industry or farming groups. The alignment of parties in *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004), illustrates this phenomenon. There, the Coalition for Clean Air, the Natural Resources Defense Council, Communities for a Better Environment, the Planning and Conservation League, and the Sierra Club were all aligned with a regional government agency in California. *Id.* at 251 n.4.

The simple fact is that in litigation implicating the more than 200 attorneys' fee statutes, the States often will find themselves aligned with a wide variety of advocacy groups, political parties, business entities, and interested individuals. The Eleventh Circuit's rule opens up the States to fee liability, even to aligned co-parties, and even when the State prevails.

The scenario faced by Alabama in the case at bar, in which a State litigating alongside an aligned party was forced to pay that party's bill, is one the States face with increasing frequency. Adding to this dynamic is the fact that the rule adopted by the Eleventh Circuit encourages litigants and their lawyers to "piggyback" on a State's litigation in an effort to generate and then claim fees. Because the scenario that unfolded in the courts below is one that the States often confront, the issue presented in the petition is of great practical significance to the States.

III. AWARDING ATTORNEYS' FEES AGAINST A STATE THAT WAS ALIGNED WITH THE FEE CLAIMANT WOULD CONTRADICT THE PURPOSES BEHIND ATTORNEYS' FEE-SHIFTING STATUTES.

A. The "private attorney general" rationale does not apply when the State seeks the same relief sought by an aligned private litigant.

In providing for attorneys' fees for a prevailing party, Congress sought to enable citizens to act as "private attorneys general" by ensuring they had access to counsel. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989) (observing that Congress meant to promote a role for citizens as "private attorneys general" in enacting 42 U.S.C. § 1988). With respect to § 1988, the Senate Report provided that

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

S. Rep. No. 94-1011, p. 2 (1976). The House Report likewise notes that "[i]n many instances where [civil rights] laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 94-1558, p. 1 (1976). "Because a vast majority of the victims of civil rights violations cannot

afford legal counsel, they are unable to present their cases to the courts." *Id. See also* 122 Cong. Rec. 35128 (1976) (remarks of Rep. Seiberling) ("Unless you can get adequate legal representation, the civil rights laws are just a lot of words"); *id.* at 33313 (remarks of Sen. Tunney) ("Unless effective ways are found to provide equal legal resources, the Nation must expect its most basic and fundamental laws to be objectively [sic] repealed by the economic fact of life that the people these laws are meant to benefit and protect cannot take advantage of them. Attorneys' fees have proved one extremely effective way to provide these equal legal resources. . . . ").

Importantly, the need for a "private attorney general" to police violations of the law is either nonexistent or minimal where the State—often, through the *actual* attorney general—is seeking the same relief. When the State is devoting its resources to obtaining the very relief the plaintiff seeks, the private litigant already has a champion. In that circumstance, a fee award is not justified.

B. The notion of "just desserts" cannot justify a fee award when the State has not violated the rights of the aligned party.

One foundation of fee-shifting statutes is the notion that assessing attorneys' fees is justified because the party who is forced to pay has inflicted some wrong on the party seeking the fees. The Senate

noted in its report regarding § 1988 that "[i]f private citizens are to be able to assert their civil rights, and if *those who violate the Nation's fundamental laws* are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in Court." S. Rep. No. 94-1011, p. 2 (1976) (emphasis added). Similarly, the House Report noted that fee-shifting was necessary to help the plaintiff "correct the illegality." H. Rep. No. 94-1558, p. 1 (1976). This Court's cases reflect the same premise—that forcing a party to pay attorneys' fees must satisfy "ordinary conceptions of just returns" and "intuitive notions of fairness." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). *See also Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("[w]here a defendant has not been *prevailed against* . . . § 1988 does not authorize a fee award against that defendant."); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (noting an equitable principle that justifies an award of attorneys' fees is that "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against *a violator of federal law*") (emphasis added).

Consistent with this common-sense notion, this Court repeatedly has concluded, including most recently in *Sole v. Wyner*, 127 S. Ct. 2188 (2007), that the *loser* in litigation should not be permitted to recover fees from the *winner*. The Court has observed that "ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that

defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus,* 463 U.S. at 685. By the same token, the State should not have to pay fees to a party whom it never wronged—let alone one whose cause the State has actively supported in the underlying litigation. Where, as in this case, the State has not wronged an aligned fee seeker, the State should not be forced to pay that party's attorneys' fees.

IV. THE REASONING OF THE EIGHTH AND ELEVENTH CIRCUITS LACKS ANY HISTORICAL BASIS AND CONTRAVENES CONGRESSIONAL INTENT.

A. The reasoning of the Eighth and Eleventh Circuits ignores the historical backdrop against which attorneys' fee-shifting statutes were enacted.

The determination by the Eighth and the Eleventh Circuits to award fees against aligned, prevailing parties ignores the historical backdrop that gave rise to attorney fee-shifting provisions. Congress enacted § 1988—and a host of other fee-shifting statutes—in direct response to this Court's decision in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (1975). *See Hensley*, 461 U.S. at 429 (noting that § 1988 was enacted in response to the *Alyeska* decision). The plaintiffs in *Alyeska* sought to block the construction of the trans-Alaska oil pipeline, but their lawsuit ultimately was mooted by legislation. *Alyeska,* 421

U.S. at 244-45. The Ninth Circuit nevertheless concluded that the plaintiffs were entitled to attorneys' fees. *Id.* at 245-46. This Court, after a careful review of the historical principles underlying fee-shifting, reversed this award of fees. This Court concluded that the longstanding practice under the "American Rule" was that the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Id.* at 247. The Court contrasted the practice under the American Rule with the way attorneys' fee awards had developed in England. *Id.* The Court discussed the deep historical roots of these two approaches, noting that for centuries English courts had assessed attorneys' fees against the loser in litigation, whereas the American Rule dated back to 1796. *Id.* at 247-51. This Court declined to fashion on its own a far-reaching exception to the American Rule. *Id.* at 247, 269.

Because Congress enacted § 1988 in direct response to *Alyeska*, it was surely aware of these two historical paradigms. There is no support in the text or legislative history of § 1988 for the notion that Congress intended to usher in *sub silentio* some ahistorical departure from both the American Rule and the English tradition by permitting courts to assess attorneys' fees *against* a prevailing party. Where one party is vindicated, as the State was here, it should not be forced to pay attorneys' fees, either to the loser or to an aligned party.

B. Congress makes its intent plain when departing from longstanding practice.

The Eighth and Eleventh Circuits have concluded that a litigant can obtain attorneys fees against a prevailing State on the basis of some "contribution" made to the litigation by a litigant who is aligned with the State. Setting aside the tremendous practical problems that rule raises—and the litigation explosion it will detonate—the court's holding constitutes a radical departure from the two dominant historical approaches to attorneys' fees. Had Congress intended such a dramatic break with tradition, it would have made its intent clear. In a comparable context, this Court found that "[i]f Congress had intended the truly radical departure from the American and English common law and countless fee-shifting statutes that the [court of appeals] attribute[d] to it, it would no doubt have used explicit language to this effect." *Ruckelshaus*, 463 U.S. at 685 n.7. The Court noted in *Ruckelshaus* that where Congress desires to jettison settled models and chart a new course, it knows how to do so. *See id.* (noting that in 15 U.S.C. § 2605(c)(4)(A)(i), Congress authorized an attorneys' fee award if a party "represents an interest which would substantially contribute to a fair resolution of the issues"). Where Congress has not included "contribution" language into a fee-shifting statute, courts should not judicially add that gloss simply to achieve what they perceive to be a "fair" result. Congress clearly did not enact attorneys' fee statutes to serve as a "'relief fund for

lawyers.'" *Hensley,* 461 U.S. at 446 (Brennan, J., concurring in part and dissenting in part) (quoting 122 Cong. Rec. 33314 (1976) (remarks of Sen. Kennedy)). The Eleventh Circuit's rule creates just such a fund.

CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the Commonwealth of Virginia

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[Additional Counsel Listed On Inside Of Cover]

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In the Supreme Court of the United States

STATE OF ALABAMA, ET AL.,

Petitioners,

v.

TIMOTHY D. POPE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW, Suite 411
Washington, DC 20006
(202) 775-4520

**Counsel of Record*

QUESTION PRESENTED

Whether a litigant who requests and obtains the same relief as the party from whom he seeks attorney's fees—and whose interests are therefore aligned with those of the would-be fee-payer—is a "prevailing party" entitled to fees within the meaning of federal fee-shifting statutes.

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA), previously known as the National Institute for Municipal Law Officers, is a non-profit, professional organization of over 2500 members. Since 1935, IMLA has served as a national, and now international, clearinghouse for legal information and has fostered cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, which includes advocating the nationwide views of local governments on legal issues.

The National League of Cities (NLC) is the oldest and largest national organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with the 49 state municipal leagues, NLC serves as a resource to and an advocate for the more than 19,000 cities, villages, and towns it represents. More than 1,600 municipalities of all sizes pay dues to NLC and actively participate as leaders and voting members in the organization.

The United States Conference of Mayors (USCM) is the official nonpartisan organization of the 1,139 cities with populations of 30,000 or more. The primary roles of The U.S. Conference of Mayors are to promote the development of effective national ur-

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[1] The parties received notice of intention to file this amicus brief at least ten days prior to its due date and consented to its filing. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ban/suburban policy; to strengthen federal-city relationships; to ensure that federal policy meets urban needs; to provide mayors with leadership and management tools; and to create a forum in which mayors can share ideas and information.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, and assists counties in finding and sharing innovative solutions through education and research.

The International City/County Management Association (ICMA) is the premier local government leadership and management organization. Founded in 1914, its mission is to create excellence in local governance by advocating and developing the professional management of local government worldwide. In addition to supporting its nearly 9,000 members, ICMA provides publications, data, information, technical assistance, and training and professional development to thousands of city, town, and county experts and other individuals throughout the world.

Amici have appeared as friends of the court on behalf of their members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts. The rule adopted below threatens serious harm to municipalities, which are frequently subject to ongoing federal court orders and consent decrees that implicate federal fee-shifting statutes. Accordingly, amici and

their members are particularly interested in this case.

SUMMARY OF ARGUMENT

I. Allowing non-adversarial litigants to recover attorney's fees as "prevailing parties" under the federal fee-shifting statutes would inflict widespread harm on municipalities. The rule adopted below gives rise to perverse incentives whenever a locality seeks to modify or terminate a continuing court order, typically a permanent injunction or consent decree, implicating any of the nearly 200 fee-shifting statutes that turn on this particular term. Literally thousands of such orders or decrees are in place across the Nation and, because public-law litigation frequently involves municipal institutions, localities are squarely in the crosshairs of the Eleventh Circuit's rule. Since the legal and societal landscape is constantly changing, moreover, municipalities must frequently seek modification or abolition of such orders, which invites non-adversarial litigants to join the fray and then bill localities for their "joint" efforts. Muncipalities can ill-afford such wasteful—and often severe—expenditures of taxpayer resources.

II. Localities are particularly vulnerable to the abusive potential of the Eleventh Circuit's rule. As the record in this case illustrates, awarding fees to non-adversarial litigants encourages nakedly strategic "claim-jumping." Congress intended the fee-shifting statutes to provide the balanced incentives necessary to secure adequate enforcement of certain federal laws, not to reward enterprising attorneys who join a government initiative in hopes of a payday. And because municipalities are required by law to conduct

almost all of their business in full public view, there is little hope of preventing would-be claim-jumpers from pursuing such strategies.

III. More fundamentally, the rule adopted below gives municipalities exactly the wrong incentives. It punishes localities that move to modify or abolish illegal or outdated orders and decrees, while, perversely, protecting those who simply remain silent. At the same time, it gives municipal defendants powerful incentives in the initial litigation to resist the possibility of ongoing federal jurisdiction either by fighting otherwise valid lawsuits or by capitulating to dubious claims in order to avoid even the possibility of an entry of judgment. Where the costs of ongoing federal jurisdiction are unclear and possibly quite significant—and that is precisely the specter that the Eleventh Circuit's rule creates—localities will seek to avoid it at almost any price.

REASONS FOR GRANTING THE PETITION

The issue presented here—whether a litigant who seeks precisely the same relief as the party from whom he later demands attorney's fees may be deemed a "prevailing party" under the federal fee-shifting statutes—warrants this Court's immediate review. As petitioners have persuasively demonstrated, this question has sharply divided the federal courts of appeals. Pet. 12-19. Standing alone, that conflict is sufficient to warrant the grant of certiorari and amici will not retread that ground here. Rather, amici seek to explain why the rule approved below will impose widespread and grave harm on municipalities and others exposed to its perverse operation.

I. THE ELEVENTH CIRCUIT'S RULE WILL DRAMATICALLY INCREASE MUNICIPALITIES' EXPOSURE TO ATTORNEY'S FEE AWARDS

Under the Eleventh Circuit's definition of "prevailing party," a litigant may recover attorney's fees from parties who achieved precisely the same relief from the court. See Pet. App. 5a ("[W]e see nothing in the language of section 1988 that * * * conditions the district court's power to award fees on the defendant's assuming an opposing posture."); Pet. 27 ("[T]he Eleventh Circuit's decision creates an inequitable 'lose–lose' proposition that exposes defendants in multiparty litigation to fee liability no matter what their position."). That rule may, at first blush, appear to have only limited application, but nothing could be further from the truth. As amici explain below, pp. 6-9, *infra*, there are literally thousands of instances in which courts have entered consent decrees or permanent injunctions that implicate federal fee-shifting statutes. In all these cases, the Eleventh Circuit's rule will create perverse incentives. The sheer breadth of this problem calls for this Court's immediate review.

Because they are subject to an immense number of ongoing court orders, municipalities are particularly vulnerable to the rule's harmful effects. Many of these orders are decades old and require frequent modification (or abolition) as factual circumstances change and the legal landscape evolves. The Eleventh Circuit's rule exposes municipalities to claims for attorney's fees virtually every time any such change occurs—even if the municipality itself initiates the change. Furthermore, the rule adopted be-

low has the potential to inflict serious harm upon municipal treasuries, which can scarcely afford to pay the fees of non-adversarial lawyers. This Court's review is necessary to prevent that legally erroneous—and profoundly misguided—appropriation of taxpayer dollars.

A. A Staggering Number of Ongoing Federal Court Orders Subject to Federal Fee-Shifting Statutes Require Periodic Modification

Since the rise of modern institutional litigation in the 1950s, ongoing court orders have proliferated. Perhaps most visibly, federal courts retain jurisdiction over a large number of cases arising out of litigation under 42 U.S.C. § 1983 and Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Commentators estimate that thousands of orders in such cases remain enforceable and subject to ongoing jurisdiction. See Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 629 (2006) (observing that "thousands of federal consent decrees * * * currently exist"); cf. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015, 1018 (2004) ("[H]undreds of schools, and, eventually, thousands of other government institutions that were sued for constitutional and federal statutory violations came under the dominion of injunctions and consent decrees."). Indeed, *Brown* v. *Board of Education*, perhaps the most venerable civil rights case in American history, officially ended only a few years ago. See *Brown* v. *Unified Sch. Dist. No. 501*,

56 F. Supp. 2d 1212 (D. Kan. 1999). To be clear, amici do not mean to diminish the importance of appropriate institutional litigation; our point is simply that such suits have been (and are likely to remain) a fixture of the modern legal landscape and that they often result in court-ordered relief that remains in place for years.

Many of the institutions frequently subject to ongoing court orders are run by municipalities. As recently as 2004, "[h]undreds of school districts" were still under court supervision, Zaring, 51 UCLA L. Rev. at 1019, and, in 2001, more than one-quarter of all jails operated under court order, Camille Graham Camp & George M. Camp, *The Corrections Yearbook: Adult Systems* 38 (2001). In fact, at one time or another, court orders have governed local jails in all 50 States. Ross Sandler & David Schoenbrod, *Democracy by Decree* 4 (2003). Moreover, in 1996, 36 child welfare and foster care systems were subject to consent decrees. Zaring, 51 UCLA L. Rev. at 1018 n.8. And even these numbers likely understate the number of ongoing court orders because many decrees are not memorialized in reported decisions. See Schlanger, 81 N.Y.U. L. Rev. at 569 (noting that such orders are often "completely unobservable by ordinary case research methods").

These court orders often require modification or termination as on-the-ground circumstances change and the legal landscape evolves. Indeed, this Court has recognized the need for such revision. In *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 381 (1992), this Court advised courts to take a "flexible approach" to modification: "Because such decrees often remain in place for extended periods of time," this

Court explained, "the likelihood of significant changes occurring during the life of the decree is increased." *Id.* at 380. In *Agostini* v. *Felton*, for example, this Court granted the New York City Board of Education relief from a permanent injunction barring public school teachers from participation in a parochial school program. 521 U.S. 203 (1997). The Court noted that Establishment Clause jurisprudence had "changed significantly" since the injunction issued, making relief appropriate. *Id.* at 236.

Shifts in other areas of public law also regularly call into question the vitality of existing court orders. To name but one well-known example, this Court recently revised the permissible role of racial and ethnic considerations in the school admissions context. See *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). Likewise, *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), recently clarified the proper use of racial classifications in public school districting decisions. Rules governing conditions of confinement offer yet another example of significant change in the legal landscape. See, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 350-354 (1996), ("disclaim[ing]" any suggestion that *Bounds* v. *Smith*, 430 U.S. 817 (1977), or its antecedents established that prison libraries and legal assistance programs are ends in themselves under the Eighth Amendment); *Wilson* v. *Seiter*, 501 U.S. 294, 304-305 (1991) (restricting the extent to which conditions of confinement can be viewed in combination to constitute an Eighth Amendment violation).

Courts are frequently required to modify existing decrees or injunctions in response to such significant

legal and factual changes. A federal district court in 2004, for example, granted a joint motion to modify a school desegregation consent decree first entered in 1980. *United States* v. *Board of Educ.*, No. 80-C-5124, 2004 U.S. Dist. LEXIS 3067 (N.D. Ill. Mar. 1, 2004). The court observed that "[t]here is no question that the Chicago of 1980 and before is not the Chicago of 2004" and concluded that the decree was "no longer capable of achieving its primary objectives." *Id.* at *4.

Similarly recognizing that ongoing court orders often require modification, Congress has taken steps to simplify that process. See, *e.g.*, Schlanger, 81 N.Y.U. L. Rev. at 602, 626. The Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 *et seq.*, for example, makes it easier for States and localities to terminate judicial orders awarding prospective relief regarding prison conditions when the conditions that gave rise to the initial order change. The Act provides that courts shall terminate such an order after two years unless, among other things, the order remains necessary to correct a current or ongoing violation of a federal right. 18 U.S.C. § 3626(b)(1)-(3). Congress is also currently considering legislation that would subject one particular type of ongoing court order—federal consent decrees—to more searching periodic review. The proposed Federal Consent Decree Fairness Act, S. 2289, H.R. 4041, 110th Cong. (2007), would, upon the motion of a state or local government, modify or terminate any consent decree that is more than four years old in the absence of a demonstrated, ongoing need for the decree. See *id.* at § 3.

Unlike this Court and Congress, the Eleventh Circuit is apparently untroubled by this problem. Its

rule would discourage localities from asking courts to modify orders issued long ago to reflect current conditions. Under its approach, a municipality would naturally be reluctant to ask the court for relief. The threat of fee awards to non-adversarial litigants might simply be too great to justify the request.

B. Allowing Non-Adversarial Litigants to Collect Attorney's Fees Would Seriously Harm Cash-Strapped Municipalities

This Court has been (rightly) sensitive to the burden that attorney's fees impose on municipal budgets. That concern flows from the practical reality that monetary awards place a "strain on local treasuries and therefore on services available to the public at large." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (refusing to expose municipalities to punitive damages awards under Section 1983). "Liability for attorney's fees," this Court has observed, "would have a particularly severe impact" when localities face potentially large awards. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 123 (2005).

That concern is well-founded. Attorney's fees can be significant and often exceed damages awarded on the merits. *Evans* v. *Jeff D.*, 475 U.S. 717, 734 (1986). Indeed, attorney's fees need not be proportionate to actual damages. *City of Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986). In *Rivera*, for instance, the claimant was awarded $245,456 in attorney's fees but only $33,350 in damages. *Id.* at 582.

The Court's concern also reflects the reality that localities are frequently strapped for cash. In the 1990s, unbalanced municipal budgets were an "increasingly common phenomenon." Anthony G. Cahill & Joseph A. James, *Responding to Municipal Fiscal Distress: An Emerging Issue for State Governments in the 1990s*, 52 Pub. Admin. Rev. 88, 88 (1992). This unfortunate trend has not abated. Indeed, "about a hundred local governments have suffered from financial crisis in recent years." Omer Kimhi, *Reviving Cities: Legal Remedies to Municipal Financial Crises*, 88 B.U. L. Rev. 633, 633 n.2 (2008). Factors beyond municipalities' control are often to blame for these woes. Declining state aid, tax caps, and state constitutions that restrict certain revenue streams all contribute to the problem. Beth Walter Honadle, *The States' Role in U.S. Local Government Fiscal Crises: A Theoretical Model and Results of a National Survey*, 26 Int'l J. Pub. Admin. 1431, 1459 (2003). The recent rapid decline in home values, which constitute a significant component of most municipal tax bases, has compounded the crisis. Rural municipalities find it particularly difficult to solve financial problems due to their dependence on part-time workers, high turnover rates, outdated record-keeping systems, and limited economies of scale. *Ibid.*

Because attorney's fees can be high when budgets are tight, the Eleventh Circuit's rule presents localities subject to stale court orders with a Hobson's choice. Seeking modification may invite a rush of non-adversarial, fee-seeking litigants. To pay for these fees, impecunious localities may have to cut social services, raise taxes, or go further into debt. Alternatively, localities may be forced to ignore changes

in the legal and factual landscape and thus leave obsolete and even unconstitutional orders in place.

II. LOCALITIES ARE PARTICULARLY VULNERABLE TO THE CLAIM-JUMPING THAT THE ELEVENTH CIRCUIT'S RULE INVITES

A. As This Record Shows, Deeming Non-Adversarial Litigants "Prevailing Parties" Can Encourage Nakedly Strategic Claim-Jumping

The Eleventh Circuit's rule is further flawed because it encourages "claim-jumping," strategic behavior that the fee-shifting statutes should discourage. As the record in this case reveals, rewarding non-adversarial litigants with attorney's fees can encourage lawyers to jump into ongoing litigation for the wrong reason—to obtain large fees with minimal effort rather than to vindicate individual rights. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 443-444 (1983) (Brennan, J., concurring in part and dissenting in part) (noting that fees should be adequate to attract competent counsel, but not produce windfalls to attorneys).

This case vividly illustrates the potential for the Eleventh Circuit's rule to invite claim-jumping. According to an affidavit submitted by the general counsel for the Alabama State Personnel Department, Alice Ann Byrne, respondent Pope's lawyer admitted that he was intervening in the litigation for the sole purpose of generating attorney's fees. See Doc. 748, Ex. A, ¶ 8 (Aff. of A. Byrne). While it is true that Pope contests Byrne's account, see Pope C.A. Br. 13 (quoting Timothy Pope's lawyer as claiming that

he had no "desire to horn in on the State's parade"), that debate is beside the point. Byrne's affidavit at the very least illustrates how the Eleventh Circuit's rule can encourage unseemly and unproductive behavior.

Pope was denied a promotion due to the No-Bypass Rule in September 2002, after which he filed an action alleging race discrimination. See Pet. App. 2a. It was not until February 25, 2003, however, that Pope moved to intervene in the *Frazer* litigation in order to challenge the Rule directly. *Ibid.*

According to Byrne's testimony, Pope's lawyer changed his tune only after learning that the State had commissioned at significant expense an expert study showing a basis for ending the No-Bypass Rule and planned to seek termination of the rule. See Doc. 748, Ex. A, ¶ 8 (Aff. of A. Byrne) (stating that Fitzpatrick admitted he filed the motion to intervene only after a lawyer for the State "told him about our expert report and how good the numbers looked for ending the No-Bypass Rule" and that the State had commissioned the report "at a cost of several hundred thousand dollars"). It was at that point that "Mr. Fitzpatrick told [Byrne] in unambiguous terms that he had filed their preemptive Pope intervention motion *for the purpose of hijacking the litigation to obtain attorney's fees.*" *Ibid.* (emphasis added). According to Byrne:

> Mr. Fitzpatrick then started laughing and told me to go check [the fax machine]. Upon checking my fax machine, I found Pope's Motion to Intervene in the Frazer case. I * * * asked him why he had filed this motion, and Mr. Fitz-

> patrick stated that he was "claim-jumping Lisa", * * * who was one of the attorneys engaged by the State to work on terminating the Frazer no-bypass rule. When I said that I did not understand, Mr. Fitzpatrick replied "attorney fees." I responded "from whom" and he said "you."

Ibid.

Pope's motion to intervene thus powerfully illustrates the behavior that the Eleventh Circuit's rule encourages. Byrne's testimony suggests that the motion might have been aimed not at ending the No-Bypass Rule—or, if so, only incidentally—but at collecting attorney's fees in a case where the lion's share of the costs had already been borne by the State and the path for seeking termination of the rule had already been charted. Again, regardless of whether Pope was, in fact, "claim-jumping" so shamelessly, Byrne's affidavit vividly reveals the potential for such abuse that the Eleventh Circuit's rule creates.

To the extent the Eleventh Circuit's rule encourages claim-jumping, it thwarts the purpose of fee-shifting statutes. Fee-shifting statutes work as a limited exception to the "American" rule and award attorney's fees to prevailing plaintiffs who perform the services of a "private attorney general." Such plaintiffs "render[] substantial service * * * to the community at large by securing for it the benefits assumed to flow" from a defendant's "compliance with its constitutional mandate." *Bradley* v. *School Bd.*, 416 U.S. 696, 718 (1974). Awarding fees to non-adversarial litigants, by contrast, rewards lawyers for bringing unproductive, duplicative claims that do not promote

private enforcement of federal rights. That perverse incentive does not "serve" the community or meaningfully advance the important interests fee-shifting statutes are designed to promote.

B. Because Localities Almost Always Operate Transparently, They Are Particularly Vulnerable To Claim-Jumping

Municipalities are particularly vulnerable to the claim-jumping the Eleventh Circuit's rule invites. Open-government or "sunshine" laws, which require local governments to make decisions only after public deliberation, make it possible for plaintiffs' attorneys to receive advance notice of litigation decisions by municipalities. Attorneys may use that information to target litigation simply for the purpose of collecting attorney's fees. The rule thus both penalizes municipalities for challenging outdated and possibly unlawful court orders and encourages them to resist open-government laws.

Almost all municipalities are subject to open-government laws, which require local governments to conduct their meetings and deliberations in public and give the public complete access to municipal records. See Ann Taylor Schwing, *Open Meeting Laws* §§ 4.24-4.32 (1994). Practical concerns, moreover, lead many local governments to conduct their business, including matters related to potential litigation, in the open. Unlike state governments (and perhaps a handful of larger cities), most municipalities do not have regular access to teams of lawyers to plan out comprehensive litigation strategies outside of public view. Instead, municipal litigation is frequently debated in the ordinary (and public) course of business.

This fact makes municipalities uniquely vulnerable to claim-jumping because would-be claim-jumpers have easy access to municipalities' litigation strategies. If a city council, for example, considers seeking modification of a consent decree, those discussions almost always will be aired at public meetings. A would-be claim-jumper can prepare and simply wait to join the action once it begins and then obtain fees if the action is successful.

While most open-government laws place some limitations on required public disclosure of materials and discussions relating to litigation, these limitations are not universal and are generally limited only to attorney-client communications. See generally Schwing, §§ 7.60-7.66 (discussing the various approaches of the States that protect communications between a public body and its attorney); *id.* § 7.70 (examining those States that do not except attorney-client communications from open meeting laws). There may also be significant overlap between those activities that are undertaken in anticipation of litigation and those activities which set local policy, such as petitioners' decision here to fund the study to challenge the No-Bypass Rule. Cf. *Clark-Cowlitz Joint Operating Agency* v. *Federal Energy Regulatory Comm'n*, 798 F.2d 499, 502 (D.C. Cir. 1986) (en banc) (noting the difficulty in drawing a line between litigation strategy and policy formation).

Even if municipalities could employ attorney-client exceptions to shield certain litigation decisions, encouraging such reliance undermines the important objectives open-government laws serve. Such laws are designed to keep public officials accountable to the electorate and to provide the public a meaningful

role in making local policy decisions. See, *e.g.*, Ark. Code Ann. § 25-19-102 (West 2008) ("It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy."). Public participation is vitally important at the local level, where government most immediately affects people's daily lives. See Schwing § 4.26, at 78-79 ("Application of open meeting requirements to * * * local public entities is especially significant because these entities operate in the same locale as the citizens they serve, making citizen participation in government readily available to the public."). And the public's interest is seldom greater than when debating the important policy matters that are frequently the subject of federal litigation.

III. THE ELEVENTH CIRCUIT'S RULE GIVES LOCALITIES EXACTLY THE WRONG INCENTIVES

A. The Rule Discourages Localities From Seeking to Modify Obsolete or Illegal Judicial Orders, Perversely *Increasing* The Need for "Private Attorneys General"

The Eleventh Circuit's rule contravenes the purposes underlying federal fee-shifting statutes in two principal ways. First, the rule encourages "private attorneys general" to participate in lawsuits where their participation is of minimal value. Second, it discourages localities from attempting to modify or terminate obsolete or illegal judicial orders.

"Under [the] 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" *Buckhannon Bd. & Care Home* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (internal citations omitted) (quoting *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 819 (1994)). Fee-shifting provisions (such as 42 U.S.C. § 1988(b), at issue here) represent a limited exception to that rule. Fee-shifting statutes are designed to provide enforcement incentives for private attorneys general, but that underlying policy has limits:

> Since the fee-shifting statutes * * * allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of the enforcement of federal law by private attorneys general. Rather, Congress desired an appropriate level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail on the merits, or at least to those who achieve an enforceable alteration of the legal relationship of the parties.

532 U.S. at 620 (Scalia, J., concurring) (internal quotations and citation omitted).

The Eleventh Circuit's rule does not promote the "appropriate level of enforcement." Quite the opposite, in fact. It encourages "private attorneys general" to join litigation when their contribution merely duplicates others' efforts—that is, when their presence is needed *least*. The rule thus serves to maximize the number of litigants and so undermines efficiency. That result contravenes section 1988's "finely balanced congressional purpose to provide plaintiffs

asserting specified federal rights with 'fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys.'" *Hensley* v. *Eckerhart*, 461 U.S. 424, 443-444 (Brennan, J., concurring in part and dissenting in part) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess., at 6 (1976)).

Furthermore, the Eleventh Circuit's rule serves none of the six recognized rationales for fee-shifting statutes: (1) that the losing litigant should pay the winner's costs in the interest of fairness; (2) that the litigant should be made financially whole for the legal wrong suffered; (3) that fee-shifting may have deterrent and punitive value; (4) that suits by private attorneys general should be encouraged because of their public usefulness; (5) that the relative strengths of the parties should be equalized; and (6) that a fee-shifting scheme may have desired incentive effects. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 653 (1982).

None of these rationales justifies fee-shifting when, as here, public enforcement has already begun and the interests of the government are aligned with those of the attorney's fee-claimant. First, ordering the government to pay an aligned party's attorney's fees does not increase "fairness" in any meaningful sense. Nor is there a need to make the aligned party whole when his participation in the suit is unnecessary to achieving his desired outcome. Here, for example, because Alabama already had committed to ending the complained-of policy, Pope's rights could have been vindicated at no cost. Likewise, there is no punitive or deterrent value to fee awards where the government is actively working to achieve the same

result sought by the fee-claimant. In such cases, the government is not doing anything the fee-claimant would wish to deter or punish; rather, it acts in the fee-claimant's own interest.

Suits by private attorneys general are, moreover, significantly less useful when the government is already pursuing the same suit itself. In contrast to a litigant who initiates an independent suit, the litigant who joins on the government's side in a suit the government has initiated performs essentially duplicative and inefficient functions. As the D.C. Circuit has recognized:

> [T]he legislative history of sections 1973*l*(e) and 1988 emphasizes over and over again the critical goal of enabling private citizens to serve as "private attorneys general" in bringing suits to vindicate the civil rights laws. * * * [T]his objective is far less compelling when the actual Attorney General participates in the case. * * * It cannot be said [in such cases] that rights are being denied because of inability to pay attorney's fees.

Donnell v. *United States*, 682 F.2d 240, 246 (D.C. Cir. 1982).

There is also no need to equalize the relative strengths of parties that are on the same side of a lawsuit. In fact, requiring localities to pay the attorney's fees of others on their own side reduces the localities' economic strength and consequently harms the interests of both the locality and the aligned party (if not his attorney).

Finally, the Eleventh Circuit's rule perverts the fee-shifting statutes' laudable incentives. The rule not only encourages duplicative actions, but also penalizes those localities that seek to aid would-be litigants by modifying or terminating obsolete or illegal judicial orders. The rule serves only the interests of enterprising attorneys and does so by harming their clients. States and municipalities will understandably hesitate before seeking to modify obsolete injunctions and consent decrees if others who later jump in *on their side* can ultimately demand attorney's fees from them. And by discouraging localities from initiating such suits, the Eleventh Circuit's rule actually *increases* the need for private attorneys general to enforce civil rights laws.

Even more perversely, however, the Eleventh Circuit's rule punishes localities for attempting to comply with federal law. By forcing localities to pay fees when they succeed in modifying consent decrees or injunctions to accord with current legal requirements, the rule discourages such efforts and forces localities to remain under court orders that no longer reflect federal law.

B. The Rule Creates Incentives In Primary Litigation That Favor Protracted Litigation And Voluntary Capitulation Over Settlement

The Eleventh Circuit's rule also distorts the incentives of parties involved in primary litigation. Localities would be justifiably reluctant to submit to continued judicial supervision if faced with the possibility that additional fees would be awarded whenever they successfully update the original judicial decree

to reflect changed legal or factual circumstances. By effectively raising the cost of continued judicial supervision, the rule thus strongly discourages localities from settling on such terms. But often such settlements are the only ones possible. In these situations, then, settlement itself becomes more difficult or impossible and the many "benefits [it] provides for civil rights plaintiffs as well as defendants," *Evans* v. *Jeff D.*, 475 U.S. at 732-733 (citing *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985)), are lost.

Another, equally troubling reaction is also possible. Whenever judicial resolution of primary litigation could entail continued supervision over a matter, defendants can be expected to try to avoid the issuance of such a judgment. As a result, local governments facing uncertain future liability for attorney's fees have powerful incentives to modify challenged practices in order to avoid judgment. When rejecting the "catalyst theory" as a basis for fee awards in *Buckhannon*, this Court discounted the threat that "mischievous defendants" would alter their behavior to "moot[] an action before judgment in an effort to avoid an award of attorney's fees." 532 U.S. at 608. When faced with the possibility of a permanent injunction or consent decree that would leave it vulnerable to unpredictable future attorney's fee awards, however, a locality may be forced to "slink away on the eve of judgment," *id.* at 618 (Scalia, J., concurring), in order to prevent the future application of "a rule that causes the law to be the very instrument of wrong—exacting the payment of attorney's fees to the [intervening] extortionist." *Ibid.*

Because "a mootness dismissal is not easily achieved," *Buckhannon*, 532 U.S. at 639 (Ginsburg,

J., dissenting), localities operating under the Eleventh Circuit's rule will face the temptation to moot threatened actions even before they even begin. In light of the uncertainty inherent in the estimation of a future litigant's fee award—and the ease with which a non-adversarial litigant could secure an award under the Eleventh Circuit's rule—the forward-looking locality will have an incentive simply to capitulate to a plaintiff's demands before the underlying primary litigation can reach final judgment. Like the "catalyst theory" the Court rejected in *Buckhannon*, the Eleventh Circuit's rule harms cash-strapped local governments by "putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation." *Id.* at 620 (Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, NW
Suite 411
Washington, DC 20006
(202) 775-4520

**Counsel of Record*

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